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(1)

No. 081161

In the Supreme Court of the United States

D. Eugene Rogers,

Petitioner,

Michalee Rogers,

Plaintiff,

vs.

James W. Hess, Attorney at Law;
John W. Terpstra, Attorney at Law;
Ronald G. Black, Attorney at Law;
Kim E. Brandell, Attorney at Law; and
Jeffrey J. Jensen, Attorney at Law,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE MINNESOTA SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

John R. Neve
Counsel of Record
NEVE & ASSOCIATES, PLLC
8500 Normandale Lake Blvd.
Suite 1080
Minneapolis, Minnesota 55437
(952) 746-2400

Counselor for Petitioner

2009 – Bachman Legal Printing ■ (612) 339-9518 ■ 1-800-715-3582 ■ Fax (612) 337-8053

QUESTION PRESENTED

When a plaintiff has presented sufficient evidence at trial to support his claim of attorney malpractice, does a court violate the plaintiff's constitutional right to trial by jury, as guaranteed by the Seventh Amendment to the United States Constitution, when it directs a verdict and takes the case away from the jury?

PARTIES TO PROCEEDING

The parties to the proceeding below were the Petitioner D. Eugene Rogers, an individual residing in the State of Minnesota, and the Respondents James W. Hess, John W. Terpstra, Ronald G. Black, Kim E. Brandell, and Jeffrey J. Jensen, attorneys at law licensed to practice in the State of Minnesota.

CORPORATE DISCLOSURE STATEMENT

There are no corporate parties in this matter, and therefore, no disclosure is required.

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PETITION FOR CERTIORARI

The Petitioner D. Eugene Rogers ("Rogers") respectfully requests that a writ of certiorari be issued to review the order of the Minnesota Supreme Court filed December 16, 2008 denying further review of the Minnesota Court of Appeals' opinion filed on September 16, 2008.

OPINIONS BELOW

The Order of the Minnesota Supreme Court denying further review is unreported and is reproduced in the Appendix at A-1.[1] The Minnesota Court of Appeals' opinion is unpublished and is reproduced in the Appendix at A-2.

JURISDICTION

The Order of the Minnesota Supreme Court denying further review of the opinion of the Minnesota Court of Appeals was filed on October 16, 2001. A-1. This Court has jurisdiction under 28 U.S.C. § 1257(a).

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[1] Petitioner will cite to its Appendix as "A-___."

CONSTITUTIONAL PROVISIONS INVOLVED

Seventh Amendment to the United States Constitution provides in relevant part:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

U.S. Const. Amend. VII.

STATEMENT OF THE CASE

A. Factual Background.

This is the story of Eugene Rogers and how the justice system has failed him. In 1969, Rogers purchased a home located on 2 ½ acres of land in Coon Rapids, Minnesota (the "Property"). At the time, the home was the only one around. Rogers believed the area would eventually be built up and he

hoped to have the opportunity to develop his Property some day.

When he purchased it, Rogers accessed the Property by traveling along Partridge Street and then proceeding in an easterly direction over a public road identified as 121st Street, which had been continuously maintained, plowed, and graveled by the City. The City had installed a trunk line sewer along 121st Street and it was to be the "collector street" for any development in the area. A title opinion Rogers procured before he purchased the Property showed 121st Street as a dedicated, public street.

Rogers' hopes of being able to develop his land all came to an end, however, when one morning heavy equipment showed up near his front yard. Rogers soon learned that City had approved a preliminary plat in 1992 that vacated the road Rogers used to access his Property and landlocked Rogers' homestead. Rogers received no notice of the preliminary plat, as required by law. The City officials did this intentionally due to their animosity against Rogers. (Trial Transcript ("Tr.") at 351.)

Rogers did what any reasonable person would do in such a situation; he hired attorneys – the Respondents – to bring suit to establish a statutory dedicated street and a common law dedicated road and for inverse condemnation and damages for the loss of the use and enjoyment of his Property and the diminution of value of the Property. The trial court bifurcated the proceeding to allow the issue of whether or not Rogers had access to his property by some type of public thoroughfare to be decided first, and damages to be decided subsequently. In May 1996, a jury determined that Rogers' access constituted a statutorily dedicated street and common law dedicated road that the City had publicly maintained. A-10-13.

Although the jury verdict appeared favorable, it left Rogers with only a "trail" to his home and his property remained undevelopable. (Tr. 191.) Respondent Ronald Black informed Rogers that city streets required a minimum of 33 feet on both sides of the property line and the jury verdict had not given Rogers legal access and the Property was landlocked. (Tr. 195-96.) Landlocked property cannot be developed and this caused Rogers significant damage. (Tr. 188.) Rogers understood that, although he could technically reach his home, if he were to bring a plat

or plan to develop the Property to the City that involved use of the "trail", the City would reject the plan as inconsistent with the City's standards and ordinances. (Tr. 196.)

Due to the inconsistencies of the jury verdict, in that it recognized that the City had maintained a public road to the Property but failed to find a road of adequate size, Rogers demanded that Respondents appeal the verdict. Respondents refused and stated they would go forward with the inverse condemnation claim and seek "the six figure damages that would be awarded" in that case.

Respondents initiated a second action seeking damages for the inverse condemnation, which the City removed to federal court (the "Federal Action"). Respondents alleged that Rogers' damages were "in excess of $50,000.00", including $70,000 for reduction in value because of lack of access, $10,000 per year for temporary loss of public access, $240,000 less development costs in inability to develop the property, $50,000 or more for psychological damages, and attorneys' fees. (T. 359-60.) It is undisputed that in the Federal Action, Respondents conducted no discovery and failed to procure updated appraisals.

On August 21, 1997, Respondent James W. Hess wrote to Rogers advising him that United States District Court Judge Paul Magnuson had conducted a scheduling conference at which he had "clearly indicated he was very skeptical as to the viability of our claim under 42 U.S.C. § 1983." (Tr. 381.) Hess could have addressed Judge Magnuson's skepticism if he had reviewed the file and learned that there was evidence of intentional, bad faith action by the City. Instead, Hess wrote several letters to Rogers pressuring him to settle the case. These letters also made several statements about attorneys' fees due and owing, but Rogers was not in arrears on any legal fees owed to Respondents. As Rogers' expert witness testified, Respondents were more interested in getting paid rather than seeking to win the case. (Tr. 443.)

Respondents' intense pressure on Rogers to settle culminated in February 1998. In a telephone conversation, Rogers informed Hess that he did not have any authority "to settle anything on my behalf." (Tr. 220.) Hess then told Rogers that he was leaving the firm and that Hess had received instructions from the other senior members of the law firm "to get rid of this case." (*Id.*) Hess said that if Rogers did not settle, Hess would put a $60,000 lien against the

Property. (*Id.*) Rogers responded, "Sir, you can't do that . . . I don't owe you that money and I demand that we go to trial like I was promised." (Tr. 220-21.) Hess replied, "Mr. Rogers, I am an attorney, I can do whatever I want," and he hung up the phone. (*Id.*)

The next day, Rogers received a call from Respondent Black who said that if Rogers did not come to their office, the threats that Hess made would come true. (*Id.*) Reluctantly, Rogers went to Respondents' office late that afternoon. Hess placed a "half a page" in front of Rogers with a place for his signature, and told Rogers to sign it, which he did. Rogers was never given a chance to read the entire settlement agreement. Subsequently, Rogers received a check for $35,000 and the firm retained $20,000 for its fees. The settlement was completely inadequate and did nothing to remedy Rogers' lack of access.

B. Proceedings Before the Sherburne County District Court.

Petitioner brought this action for legal malpractice against Respondents, who were associated with the law firm of Terpstra, Black, Brandell & Hoffman, alleging that Respondents

committed professional malpractice by failing to prepare proper pleadings and motions, failing to conduct adequate and timely discovery, failing to prepare for trial and secure evidence and witnesses for trial, and for entering into an improper settlement and pressuring Rogers to enter a settlement agreement.

Before trial, Respondents brought two separate motions for summary judgment seeking to have Rogers' claims dismissed due to a failure by Rogers to satisfy the fourth "but for" element of his legal malpractice claim. The Honorable Robert B. Varco, Judge of Sherburne County District Court, denied Respondents' motions each time, holding that genuine issues of material fact precluded judgment as a matter of law. A-20. In denying Respondents' first motion for summary judgment, the trial court reasoned:

> It is the law in Minnesota that it is only the clearest of cases that the question of negligence becomes one of law. In each case, except when reasonable minds may not differ, the degree of care, and whether it was exercised are questions for the jury. Analyzing the parties'

> arguments with the four legal malpractice elements in mind, this Court finds that the instant case is not one of the "clearest of cases" and that the question of negligence is appropriately determined by a jury.

See A-20.

The case was tried to a jury. After the close of Rogers' case, Respondents moved for a directed verdict or judgment as a matter of law pursuant to Minn. R. Civ. P. 50.01. Although Rogers presented numerous, qualified expert witnesses in support of his claims, the trial court granted Respondents' motion, holding essentially that Rogers had failed to establish sufficient evidence that he would have been successful in the underlying litigation. (Tr. 800-03.)

After trial, Rogers timely moved the court for a new trial. Respondents moved for taxation of their costs and disbursements. The trial court denied Rogers' motion for a new trial and awarded costs and disbursements to Respondents in the amount of $49,226.53. A-70. Rogers timely appealed to the Minnesota Court of Appeals from the trial court's

denial of his motion for a new trial and from the judgment entered.

C. The Decision of the Minnesota Court of Appeals

The court of appeals affirmed, holding that Rogers did not present sufficient evidence at trial establishing that he would have succeeded in the Federal Action.

D. The Decision of the Minnesota Supreme Court.

Rogers petitioned the Minnesota Supreme Court for discretionary review of the court of appeals' decision. *See* Minn. R. Civ. App. P. 117. On December 16, 2008, the court issued an order declining to review the case. Rogers now submits this Petition to this Court.

REASONS FOR GRANTING THE WRIT

I. THE DISTRICT COURT VIOLATED PETITIONER'S RIGHT TO TRIAL BY A JURY OF HIS PEERS, IN VIOLATION OF THE SEVENTH AMENDMENT OF THE CONSTITUTION, BY DIRECTING THE VERDICT AGAINST HIM.

Whether a directed verdict should be granted is a matter of federal law "having to do with the right of jury trial under the Constitution of the United States." *Lowry v. Seaboard Airline R. Co.*, 171 F.2d 625, 630 (5th Cir. 1949) (citing *Grand Trunk Ry. Co. of Canada v. Ives*, 144 U.S. 408 (1892)). Because a directed verdict – now know as a judgment as a matter of law – deprives a litigant to a trial by jury, it "should be reserved for the exceptional case where there can be but one reasonable conclusion as to the verdict." *Van Boening v. Chicago and North Western Transp. Co.*, 882 F.2d 1380 (8th Cir. 1989) (citing *Borough v. Duluth, Missabe & Iron Range Ry. Co.*, 762 F.2d 66 (8th Cir.1985)).

This was not "the exceptional case." Rogers' claims survived summary judgment *twice*. In denying Respondents' first motion for summary

judgment, the trial court correctly stated that this was not the "clearest of cases" and that the question of negligence is appropriately determined by a jury. Unfortunately, the jury was denied that opportunity.

This case illustrates the wisdom articulated by the Eight Circuit in *Dale v. Janklow*, 828 F.2d 481 (8th Cir. 1987), where the court noted that with motions for judgment as a matter of law "the better practice, as a general rule, [is] for the district court *to permit the trial to be completed.* . . . if the jury reached an incorrect verdict, the trial court could still issue a judgment notwithstanding the verdict and . . . obviate the need for a new trial if error had, in fact, been committed." *Id.* at 484. (Emphasis added.)

This case presents the Court with the opportunity to adopt the rule in *Dale*. In this case, the trial should have been completed. Steven R. Sunde (hereinafter "Sunde"), a licensed attorney with extensive experience, testified on behalf of Rogers as one of his expert witnesses. Sunde testified that the complaint in the second action was deficient and that Rogers would have been successful in his second action against the City, "but for" Respondents' failure to conduct discovery or otherwise investigate the case. (T. 349, 363-65.) Sunde testified that this

failure to properly plead intent was fatal to the Federal Action:

> Q. And what would be the result of not having the intent requirement in that pleading?
>
> A. Well, then, you wouldn't meet the statutory standard of the statute and you would not be giving the other side proper notice that that's what you were pleading, what your cause of action is.
>
> Q. Would – how would that affect your remedy?
>
> A. ***It means you would be unsuccessful.***

(Tr. 349.) (Emphasis added.) Sunde further testified that Rogers had substantial damages in the federal action. (T. 360.) Despite this testimony, the court of appeals held that Sunde's opinions were insufficient to create an issue for trial. If this is the law, it is hard to imagine what expert testimony is required to bring a claim for malpractice against an attorney.

Likewise, contrary to the holding of the court of appeals, Mark Kleckner did testify that Rogers had developable access prior to the development of the adjacent property. Specifically, he testified that "the subdivision had come in and landlocked Rogers' property." (T. 469.) Kleckner's testimony throughout trial presumed that Rogers' had developable access prior to 1991 and this was never a contested issue. Kleckner's affidavit also identified damages in excess of $500,000.00. The court of appeals, however, for the first time in this case determined that there was no evidence that Rogers had access that would allow development at his Property prior to 1991. This is a preposterous holding and completely unsupported by the record. The need for this petition and the earlier appeals could have been avoided if the district court had simply permitted *"the trial to be completed." Dale*, 828 F.2d at 484. The rule is *Dale* is also makes since from a public policy perspective because it virtually guarantees that a litigant's Seventh Amendment right will not be violated.

Most disturbing about the decision of the Minnesota appellate courts is their approval of the settlement in the Federal Action, relying on the public policy against actions based on a client's dissatisfaction with a settlement. This is, however,

not a case that is based "*solely* on the ground that a jury might have awarded . . . more than the settlement." *Rouse v. Dunkley & Bennett, P.A.*, 20 N.W.2d 406, 410 n. 10 (Minn. 1994). (Emphasis added.) It goes much farther. As stated above, Respondents failed to do any further investigation in response to Judge Magnuson's comments at the scheduling conference questioning whether intent could be proven, although substantial evidence existed to support allegations of intentional conduct by the City. (T. 362.) Instead, they exerted enormous and wrongful pressure on Rogers to settle the case for $55,000, when a reasonable jury would have awarded much more. (T. 360.) This pressure to settle was probably caused by Hess' complete lack of experience in inverse condemnation actions or 42 U.S.C. § 1983 cases. (T. 361.) The decisions of the district court and Minnesota appellate court ratified these actions by Respondents. The injustice of this decision cannot be overstated. This Court should issue a writ of certiorari to carefully consider the proper use of judgments as a matter of law in all proceedings.

CONCLUSION

This Court in *Jacob v. City of New York*, 315 U.S. 752 (1942), stated that "[t]he right of jury trial in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment." It is a right "so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by statute, [that it] should be *jealously guarded by the courts.*" *Id.* at 752-53. (Emphasis Added.)

This case presents an important question whose resolution by this Court will have significant impact on all jury cases tried in the nation and will greatly buttress the constitutional rights guaranteed in the Seventh Amendment. The decision allowed to stand by the Minnesota Supreme Court erodes litigants' constitutional rights to trial by jury, one of the most fundamental rights in our law.

The backyards of the homes in the new development have been sitting in Rogers' front yard for over fifteen years now. It is a constant reminder of how the City of Coon Rapids violated his rights and how his attorneys failed to get him any real relief despite being paid thousands of dollars. Instead, his

attorneys threatened him and forced him to sign a settlement agreement that did not even come close to compensating Rogers for his inability to develop his land. A gross injustice has occurred and constitutional rights trampled by failing to allow a jury of Rogers' peers decide this case.

Rogers respectfully requests that this Court issue a writ of certiorari to the Minnesota Supreme Court so that it may have an opportunity to "jealously guard" the rights granted in the Seventh Amendment.

Respectfully submitted,

John R. Neve
Counsel of Record
NEVE & ASSOCIATES, PLLC
8500 Normandale Lake Blvd.
Suite 1080
Minneapolis, Minnesota 55437
(952) 746-2400

Counselor for Petitioner

DATED: March 16, 2009

APPENDIX INDEX

STATE OF MINNESOTA
IN SUPREME COURT

A07-1104

D. Eugene Rogers,

Petitioner,

Michalee Rogers,

Plaintiff,

vs.

James W. Hess, et al.,

Respondents.

ORDER

Based upon all the files, records and proceedings herein,

IT IS HEREBY ORDERED that the petition of D. Eugene Rogers for further review be, and the same is, denied.

Dated: December 16, 2008

BY THE COURT:
s/_____
Alan C. Page
Associate Justice

ANDERSON, G. Barry, and GILDEA, JJ., took no part in the consideration or decision of this case.

Court of Appeals of Minnesota

D. Eugene ROGERS, Appellant,
Michalee Rogers, Plaintiff,

v.

James W. HESS, et al., Respondents.

No. A07-1104.

Sept. 16, 2008.
Review Denied Dec. 16, 2008.

Sherburne County District Court, File No. 71-C3-04-000915.

John Rolland Neve, Neve & Associates, PLLC, Edina, MN, for appellant.

Kelly A. Putney, Paula M. Semrow, Bassford Remele, P.A., Minneapolis, MN, for respondents.

Considered and decided by PETERSON, Presiding Judge; WORKE, Judge; and SCHELLHAS, Judge.

UNPUBLISHED OPINION

WORKE, Judge.

*1 Appellant challenges the judgment as a matter of law granted in favor of respondents in his legal-malpractice claim. Because the evidence produced at trial is insufficient as a matter of law to support appellant's claim, we affirm.

DECISION

In reviewing a judgment as a matter of law (JMOL), this court makes "an independent determination of the sufficiency of the evidence to present a fact question to the jury." *Nemanic v. Gopher Heating & Sheet*

Metal, Inc., 337 N.W.2d 667, 669 (Minn.1983)."In making such a determination, we review the evidence in a light most favorable to the nonmoving party." *Boone v. Martinez*, 567 N.W.2d 508, 510 (Minn. 1997).

Judgment as a Matter of Law

Appellant D. Eugene Rogers argues that the evidence was sufficient to preclude the JMOL granted in favor of respondents, his attorneys James W. Hess, John W. Terpstra, Ronald G. Black, Kim E. Brandell, and Jeffrey J. Jensen. To prevail in a legal-malpractice action, it must be shown that: (1) an attorney-client relationship existed; (2) the attorney acted negligently or in breach of contract; (3) such acts were the proximate cause of the client's damages; and (4) but for the attorney's conduct, the client would have been successful in the underlying action. *Rouse v. Dunkley & Bennett, P.A.*, 520 N.W.2d 406, 408 (Minn.1994). Failure to prove any one of these four elements defeats recovery. *Id.*

An essential element in a legal-malpractice action is a showing that "but for" the attorney's deficient conduct, the client would have succeeded in the underlying action. *Id.* The ultimate issue is "whether [the client] would have been successful in the underlying action had the lawyers performed as he claims they should have." *Id.* at 409.The underlying action must be recreated to determine "whether the [client] would have succeeded, had the attorney not performed negligently." *Id.* Thus, appellant was required to show that he would have been successful in proving his inverse condemnation/taking claims, and that he would have been more successful if he had gone to trial rather than settling. *See Hyduke v. Grant*, 351

N.W.2d 675, 677 (Minn.App.1984) (requiring showing that an appeal from the verdict in the underlying action would have resulted in reversal or a new trial), *review denied* (Minn. Oct. 16, 1984).

Appellant presented evidence of an underlying dispute regarding 2.5 acres he owned in Coon Rapids. Appellant gained access to this property by way of a public road that the city had continuously maintained. In 1992, appellant sued the city, claiming that the city approved a plat that allegedly cut off access to his property, inverse condemnation, and loss of value to his property. The district court bifurcated the case to first determine the access issue. In 1996, a jury decided in appellant's favor on the access issue, finding a "publicly dedicated road" that was 28 feet wide. Because this 28-foot-wide road, however, was not wide enough for a two-way street necessary for development, appellant requested that respondents appeal the jury's seemingly inconsistent verdict. Respondents instead filed an inverse-condemnation complaint alleging that the city's plat approval constituted a taking of appellant's property and a violation of his civil rights. Appellant's case was removed to federal court and was ultimately settled for $55,000. In the current malpractice action, appellant was required to recreate and prove that he would have won the inverse-condemnation claim.

*2 Minnesota courts have held that if governmental action or activity causes a definite and measurable decrease in the value of one's property and interferes with the current practical enjoyment of the property, a compensable taking has occurred. *Alevizos v. Metro. Airports Comm'n,* 298 Minn. 471, 486, 216 N.W.2d 651, 661-62 (1974); Minn. Const. art. 1, 13

(requiring just compensation when the government performs an act that, although for the public good, takes, damages, or destroys private property). Here, appellant was required to prove that but for respondents' negligence, it would have been proved in the underlying action that the city's actions amounted to a compensable taking-that the city interfered with appellant's existing property rights and caused a definite and measurable decrease in the value of his property.

Appellant argues that he presented sufficient evidence that "but for" respondents' negligence, he would have been successful in the underlying case. We disagree. Appellant would have us rely on the opinions of his expert witnesses, attorney Steven Sunde and developer Mark Kleckner. Sunde testified that respondents failed to amend the complaint to include the element of intent in the civil rights claim, conduct full discovery, and appropriately evaluate appellant's damages. Sunde generally stated that "[appellant] would have been successful" if the complaint had been pleaded correctly, and that "[appellant] would have been successful at trial" if respondents had properly conducted discovery and tried the case.

Although Sunde opined that appellant would have prevailed at trial, he offered no basis for how he reached this conclusion. Sunde did not testify as to *why* appellant would have been successful at trial. He made no detailed analysis of specific evidence that would support the underlying claims of inverse condemnation or the elements of a compensable takings claim and failed to give any direct testimony regarding whether there was a permanent taking. Likewise,

Kleckner testified regarding the obstacles to appellant's ability to develop the property because of the limited "driveway" access, but did not testify that appellant had any greater or developable access before 1991. Although the jury found a 28-foot road, appellant failed to show that a wider, developable access road existed prior to 1991 that would have allowed development. Accordingly, appellant's evidence was legally insufficient to establish his takings claim regarding his access route. *See Johnson v. City of Plymouth.* 263 N.W.2d 603, 607 (Minn.1978) (holding a property owner was not entitled to compensation despite fact that curbs and gutters abutting the property owner's business restricted access to the property because the owner was not denied reasonable access).

Nor did appellant give any factual evidence or direct testimony that: (1) the city's change in the comprehensive plan amounted to a compensable taking; (2) the existence of an easement by the city provided appellant with any actionable property right to have a road actually built; or (3) appellant's hope to develop his 2.5 acres by means of a proposed street was legally actionable. Thus, the evidence appellant presented regarding the "but for" element is not legally sufficient to support a claim for malpractice based on respondents' failure to pursue or litigate the underlying claim. We conclude that the expert's testimony that appellant would have been successful if respondents had amended the complaint, conducted discovery, and had not settled is legally inadequate to prove the causation or "but for" elements of a legal-malpractice claim.

*3 At most, appellant presented evidence of a tempo-

rary taking by the city from 1991 to 1996, during which time it denied the existence of appellant's east/west access. In granting respondents' motion for judgment as a matter of law, the district court held that appellant did not present sufficient evidence of damages resulting from this temporary taking. We agree. At trial, Sunde testified regarding three areas of claimed damages-loss of development opportunity, loss of homestead, and attorney fees-but did not present specific evidence of damages and did not discuss damages pertaining to a temporary taking. Kleckner testified that the 2.5 acres were worthless without some "legal access," and that the initial jury verdict established only limited access. Kleckner further testified that the 2.5 acres could not be developed without using the surrounding property that appellant purchased after the jury verdict, which purchase actually secured developable access to the 2.5 acres. Kleckner never testified that appellant had fully developable access prior to 1991, he did not refer to how wide the access was prior to the plat approval, and he did not testify regarding any damages specifically with respect to that access. Thus, we agree with the district court that appellant failed to prove that his damages recoverable for the temporary taking would have been better than the settlement he received.

We also note that, generally, legal-malpractice claims based on dissatisfaction with a settlement are legally insufficient and contrary to public policy. The supreme court has remarked on its "disapprov[al][of] allowing a client who has become dissatisfied with a settlement to recover against an attorney solely on the ground that a jury might have awarded him more than the settlement." *Rouse,* 520 N.W.2d at 410 n. 6.

A malpractice claim based solely on professional judgment or strategy is insufficient to show a negligent act. *Noske v. Friedberg*, 713 N.W.2d 866, 874 (Minn.App.2006) (holding trial strategy resulting from exercise of professional judgment is not actionable malpractice), *review denied* (Minn. July 19, 2006).

Regardless of whether the evidence supports a claim for negligence, appellant failed to establish that he would have been successful in the underlying claim or that he would have received more than his settlement. Because appellant's underlying claim was legally insufficient, he failed to show the "but for" causation element necessary to prevail in a legal-malpractice case. In light of the public policy disfavoring malpractice claims based on dissatisfaction with settlements, judgment as a matter of law was appropriate because appellant has failed to make a prima facie case for malpractice. Because we conclude that the district court did not err in granting respondents' motion for a JMOL, we do not address appellant's remaining trial-related issues.

Expert-Witness Fees

Appellant's argument that respondents should not have been awarded expert-witness fees for witnesses who did not testify at trial is without merit. The prevailing party in a district court action "shall" be allowed costs and reasonable disbursements. Minn.Stat. §§ 549.02, subd. 1, .04, subd. 1 (2006). Under Minn.Stat. § 357.25 (2006), the court may allow just and reasonable fees and compensation for any expert witness "summoned or sworn and examined." "An award of costs and disbursements has generally been allowed within the sound discretion of

the [district court]. As such, we review for an abuse of that discretion." *Kellar v. Von Holtum,* 605 N.W.2d 696, 703 (Minn.2000) (citations omitted).

*4 Here, the district court evaluated respondents' application for costs and disbursements, analyzed the value the expert added to the proceedings, scrutinized the rate and the amount of work the expert expended on the case, and addressed appellant's concerns regarding expert witnesses. After its evaluation, the district court allowed all of respondents' requested expert-witness fees and trial costs, except for the cost of mediation. Respondents submitted a breakdown of the witnesses' costs through affidavits setting forth the amount of time the expert billed and the total cost, upon which the district court decided that the amounts were reasonable and necessary. *See In re Trust Created by Boss,* 487 N.W.2d 256, 262-63 (affirming allowance of fees incurred for preparation of expert witness outside courtroom when such preparation was necessary, expert's costs were customary and reasonable, and preparation time was reasonable and useful), *review denied* (Minn. Aug. 11, 1992); *Johnson v. S. Minn. Mach. Sales, Inc.,* 460 N.W.2d 68, 73 (Minn.App.1990) (affirming expert-witness fees in excess of $10,000 as within the district court's discretion even when deposition was not used at trial). Based on this analysis, we conclude that the district court did not abuse its discretion in awarding fees and costs.

AFFIRMED.

STATE OF MINNESOTA
COUNTY OF ANOKA

DISTRICT COURT
TENTH JUDICIAL DISTRICT

Doyle E. Rogers,

Plaintiff,

vs.

Edward C. Wortman;
Richard L. Rick;
Charles B. Wise;
Christine C. Gabriel;
TCF Mortgage Corporation, a Minnesota corporation;
Inland Mortgage Corporation;
James J. Green; Julie A. Green; Metropolitan Federal Bank, *fsb;* and John Doe and Mary Roe, whose names are *unknown to Plaintiff,*

Defendants/Counterclaimants,

vs.

City of Coon Rapids, a Minnesota Municipal Corporation,

Third-Party Defendant.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER FOR CHANGE OF CAPTION, DISMISSAL OF PARTIES JUDGMENT BASED JURY-VERDICT

Court File No. CX-92-7510

FINDINGS OF FACT. CONCLUSIONS OF LAW, AND ORDER FOR JUDGMENT

The above entitled matter came on for jury trial before the Honorable Stephen L.. Muehlberg, Judge of District Court, Anoka, Minnesota, *on* April 29, 1996. At the close of *all* testimony and argument; the jury was presented a Special Verdict Form consisting of seven questions which it returned on Friday, May 3, 1996.

Based on the jury's answers to the Special Verdict Form the Court now makes the following:

FINDINGS OF FACT

1. Prior to the trial in this case, all parties agreed that Defendants/Counterclaimants Stanley Zawistowski, Jr. and Morning Sun Homes, Inc Should be dismissed form the action an that the caption should be amended to reflect their dismissal.

2. The City of Coon Rapids Street Department authorized and expended public funds to maintain Plaintiff's east/west access.

3. The City of Coon Rapids continuously maintained Plaintiffs east/west access from 1969 to 1989 in the same manner and quality *as* compared to the City's maintenance of already existing public roads of the same character for at least six (6) consecutive years.

4. The general public used Plaintiffs east/west access as a public road for a period of at least six (6) consecutive years from 1969 to 1989.

5. The actual dimensions and the location of Plaintiffs AEI's east/west access which has been used by the public and maintained by the City of Coon Rapids Street Department for at least six (6) years are as follows:

> From northern property line south 28 feet wide from the end of Partridge Street to eastern edge of Doyle Rogers' garage, per Exhibit 7.

6. All the property owners intended that their property be appropriated and devoted to public use as a public road.

7. The general public accepted the property owners dedication of their property for a public road *as* shown by public use and travel on their property

as a road, or as shown by the City of Coon Rapids Street Department's exercise of control over their property as a public road.

8. The actual dimensions and location of the property which the effected owners have dedicated as a public road and which has been accepted by the public has a public road 'are as follows:

> From northern property line south 28 feet wide from the end of Partridge Street to eastern edge of Doyle Rogers' garage, per Exhibit 7.

CONCLUSIONS OF LAW

1. Plaintiff has established a public road by statutory dedication pursuant to M.S. 160.05.

2. Plaintiff has established a public road by common law dedication.

3. Plaintiff is entitled to judgment of dismissal of the counterclaim of Morning Sum Homes, Inc. by stipulation of the parties.

4. The width and dimension of common law road and public road by statutory dedication are described in Findings of Fact #7 and #4 respectively.

ORDER

1. Defendants/Counterclaimants Stanley Zawistowski, Jr. and Morning Sun Homes, Inc. are dismissed from the case. The caption is hereby amended to read as it does above, and to reflect this dismissal, and the names of these Defendants/Counterclaimants shall no longer be part of the caption.

2. Plaintiff shall have judgment of dismissal of Defendant/Counterclaimant Stanley Zawistowski, Jr. and Morning Sun Home, Inc.'s Counterclaims with prejudice.

3. Plaintiff is entitled to a judgment in *his* favor and against all remaining Defendants for his costs and disbursements incurred herein.

4. The public road by common law and statutory dedication shall be legally described as:

> From northern property line south 28 feet wide from the end of Partridge Street to eastern edge of Doyle Rogers' garage, per Exhibit 7,

and shall be memorialized and recorded by the filing of a certified copy judgment with the Anoka County Recorder.

5. The clerk shall notify the parties of this Order by mailing a copy of the same to the respective attorneys of record.

6. A copy of the completed Special Verdict Farm is hereby incorporated and attached for reference.

LET JUDGMENT BE ENTERED ACCORDINGLY BY THE COURT:

Dated: 5/13/96

s/_____
Stephen L. Muehlberg
Judge of District Court

STATE OF MINNESOTA COUNTY OF SHERBURNE	DISTRICT COURT TENTH JUDICIAL DISTRICT

D. Eugene Rogers,
Michalee Rogers, his wife,
Plaintiffs

File No. C3-04-915

v.

James W. Hess, Attorney at Law,
John W. Terpstra, Attorney at Law,
Ronald G. Black, Attorney at Law,
Kim E. Brandell, Attorney at Law,
and Jeffrey J. Jensen, Attorney at Law
Defendants.

Findings of Fact, Conclusions of Law and Order

The above-entitled matter came before the Honorable Robert B. Varco, Judge of District Court, Sherburne County Government Center, Elk River, Minnesota on January 12, 2006 pursuant to Defendant's motion for summary judgment, filed December 13, 2005.

Plaintiffs were represented by Richard E. Bosse.

Defendants were represented by Kelly Putney.

Based on the file, record, and proceedings, being fully advised, the Court makes the following:

FINDINGS OF FACT

1. On May 5, 1992, Plaintiff Eugene Rogers retained the law firm of Terpstra, Black, Brandell, Kaminsky & Hoffman to represent him in connection with a suit against the City of Coon Rapids. Plaintiff Eugene Rogers alleged his property was improperly taken by

the City.[1]

2. Plaintiff signed a Contract for Legal Services on May 5, 1992.[2]

3. Defendants filed Plaintiff's suit against the City of Coon Rapids. The trial court bifurcated the proceeding. On May 3, 1996, a jury returned a Special Verdict, finding that Plaintiffs east/west access to his home is a statutorily dedicated street and common law dedicated road that the City had publicly maintained.

4. An action for damages against the City was started in 1997 by the Defendants on behalf of Plaintiff, asserting damage claims for inverse condemnation, negligence and a violation of 42 U.S.C. §1983. The action was removed to Federal Court on June 4, 1997.

5. In August 1997, Defendant Hess attended a Scheduling Conference with United States District Court Judge Paul Magnusson. Defendants assert that at the scheduling conference, Judge Magnusson indicated he was skeptical of the viability of Plaintiff's claim under 42 U.S. C. § 1983.[3]

---

[1] Memorandum in Support of Plaintiff's Motion for Partial Summary Judgment, page 1. Plaintiffs allege that in 1992 the City of Coon Rapids approved a preliminary plat plan that landlocked Plaintiffs' homestead and 2.5 acres of developable property and obliterated ingress and egress, thus diminishing its value to almost nothing, and set backyards of the new development in Plaintiffs' front yard. Plaintiffs allege that they had not received notice of the preliminary plat approval.

[2] *See,* Contract for Legal Services, page 1.

[3] Second Affidavit of Kelly A. Putney, Exhibit U, Hess Deposition, pages 16-17.

6. According to Defendants, Defendant Hess met with Plaintiff to discuss the firm's ongoing representation of him, in light of continuing outstanding fees. Plaintiff was advised that he could either (1) honor the second contract to pay the law firm at least $1,000.00 per month; (2) discharge the firm and obtain a new lawyer; or (3) authorize the law firm to try and obtain settlement offers on his behalf.[4]

7. Defendants maintain that Plaintiff authorized settlement efforts on his behalf.

8. Settlement negotiations were conducted with the City of Coon Rapids. On January 26, 1998, Defendant Hess advised Plaintiff that the City had offered to settle the case for $50,000. Defendant Hess requested authority from Plaintiff to demand $55,000 and stated that the firm would accept $20,000 as reduced payment for its outstanding fees, which totaled approximately $55,000 at that time.[5]

9. Defendant Hess wrote a second letter to Plaintiff addressing the settlement authorization on February 3, 1998.[6]

10. On February 24, 1998, Plaintiff signed a Settlement Agreement and General Release agreeing to accept $55,000 from the City of Coon

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[4] Hess Deposition, pages 46-47, 54-55; Black Deposition, pages 46-47; Brandell Deposition, pages 19-20.

[5] Second Affidavit of Kelly A. Putney, Exhibit P, Letter from James W. Hess to Eugene Rogers dated January 26, 1998.

[6] Second Affidavit of Kelly A. Putney, Exhibit O, Letter from James W. Hess to Eugene Rogers dated February 3, 1998.

Rapids to settle his damages claims.[7] The Settlement Agreement and General Release signed by Plaintiff states, in relevant part:

> Whereas it is the desire of Rogers and the City to fully and completely resolve, settle and compromise any and all claims existing between them in order to avoid the expense and uncertainly of further litigation, and for no other purpose...
>
> NOW, THEREFORE, THE UNDERSIGNED IN CONSIDERATION OF THE FOREGOING AND OF THE PROMISES AND AGREEMENTS SET FORTH BELOW, HEREBY AGREE, PROMISE AND PLEDGE AS FOLLOWS:
>
> 1. THE CITY:
>
> a. In exchange for the dismissals in Paragraph 2 below, the City shall pay to Rogers the sum of Fifty-Five Thousand Dollars ($55,000).
>
> b. The east-west access from Partridge Street to Rogers' homestead as determined by the jury in Anoka County District Case No. CX-92-7510 shall continue to exist as a public road and be maintained by the City in accordance with standard City practice and procedures.
>
> 2. ROGERS:

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[7] Id, Exhibit R, Settlement Agreement and General Release dated February 14, 1998.

a. Rogers will dismiss with prejudice any and all claims of any kind against the City of Coon Rapids without costs, attorneys fees or disbursements to either party, including any claim for the costs and disbursements from Anoka County Judgment Court File VX-92-7510.

b. Rogers will dismiss with prejudice his claims against N.C. Hoium in this matter and obtain a dismissal with prejudice of Hoium's cross-claim against the City.

***

4. Consultation with attorney: The parties represent with their signatures that they have read the terms of this agreement in full, have had the opportunity to consult with their attorneys, understand the terms of this Agreement, and agree to be bound thereby in full.

5. Release: Rogers, on behalf of himself, his successors and assigns, hereby releases and discharges any and all claims demands or causes of action, whether known or unknown or of any manner or description, which he has or may have against the City of Coon Rapids, its officers, agents and employees, which exist as of the date of the execution of this Agreement.[8]

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[8] Id.

11. On March 23, 1998, Plaintiff received a check from Defendants law firm in the amount of $35,000. Defendants' law firm retained $20,000 from the settlement to satisfy the balance of unpaid attorneys fees.[9]

12. On June 20, 1997, Plaintiff recorded a Contract for Deed dated June 19, 1997 between Plaintiffs Doyle E. and Michalee Rogers and Edward C and Marie Wortman for the purchase of approximately 37 acres of land adjoining Plaintiff's original property.[10]

13. Plaintiff filed a Complaint on April 26, 2004 on the grounds that Defendants coerced him into the settlement, and that a reasonable jury would have awarded him substantially more than the $55,000.00 received from the City.[11]

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[9] Id., Exhibit S, Letter from James W. Hess to Eugene Rogers dated March 23, 1998 with three enclosures (trust account check for $35,000, original signed copy of Settlement Agreement and General Release, and 4 copies of the settlement check).

[10] Third Affidavit of Kelly A. Putney, Exhibit B, Contract for Deed - Wortman Property. This parcel of property was purchased by Plaintiff before the settlement between Plaintiff and the City of Coon Rapids was reached. Plaintiff asserts that Defendants advised him to purchase the additional 37 acre parcel. Apart from Plaintiff's assertions, no evidence exists that Defendants were aware of Plaintiff's purchase. Indeed, it appears Plaintiff sought damages related to the 37 acre parcel for the first time in the June 9, 2005 Motion for Summary Judgment. Even if Plaintiff could prove damages related to the 37 acre parcel, without evidence that Defendants were aware of the parcel, awarding damages to Plaintiff would be inappropriate.

[11] *See*, Memorandum in Support of Plaintiffs' Motion for Summary Judgment, page 2. Plaintiffs represent that $383,000 was the value of the homestead property and developable

Plaintiff sought damages in excess of $50,000.00.

14. Plaintiff filed a Notice of Motion and Motion for Partial Summary Judgment on May 5, 2005 and Defendants filed a Notice of Motion and Motion for Summary Judgment on June 9, 2005. Both summary judgment motions were denied by this Court in an Order filed October 18, 2005.[12]

15. Defendant filed a second Notice of Motion and Motion for Summary Judgment on December 13, 2005 on the grounds that Plaintiff cannot establish that "but for" Defendants' alleged negligence (allegedly coercing Plaintiff into settling) he would have prevailed at trial.[13]

CONCLUSIONS OF LAW

Summary judgment is appropriate "if the pleading, depositions, answers to interrogatories and admissions on file...show that there is no genuine issue as to any material fact and that either party is

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acreage. However, Plaintiffs purchased an additional 37 acres in 1997 and argue in their memoranda that they should also be given damages for the value of those additional acres. Plaintiffs seem to be seeking approximately $822,800.00 in total damages.

[12] While the October 18, 2005 Order did not explicitly dismiss Michalee Rogers as a plaintiff, because the parties agreed that Michalee Rogers is not an appropriate party to the action, Michalee Rogers shall be formally dismissed herein. Accordingly, the Court will reference only Eugene Rogers as the sole remaining plaintiff in this case. *See*, Order, page 12, filed October 18, 2005.

[13] *See*, Defendant's Memorandum of Law in Support of Motion for Summary Judgment, page 2, filed December 13, 2005.

entitled to judgment as a matter of law."[14] Minnesota courts have emphasized that summary judgment is a blunt instrument that should be employed "only where it is perfectly clear that no issue of material fact is involved.[15] Summary judgment should not be granted where reasonable minds could draw different conclusions from the evidence.[16] The evidence must be considered in a light most favorable to the non-moving party; and any doubts about material facts are resolved in its favor.[17] The non-moving party's evidence must be significantly probative, not merely colorable.[18] In this case, there are issues of material fact about which reasonable minds could draw different conclusions.

For an award of summary judgment, there must be no genuine issue of material fact upon which reasonable minds differ.[19] For Plaintiff to succeed with an attorney malpractice claim under Minn.Stat. § 481.071, he must show not only a violation by the attorney of professional standards of due care and ethical conduct, but also that, but for the violation, some distinct advantage would have been obtained by the client.[20] Plaintiff has the burden of proving the

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[14] Minn. R. Civ. P. 56.03.

[15] Donnay v. Boulware, 144 N.W.2d 711, 716 (Minn. 1966).

[16] DHL, Inc. v. Russ, 566 N.W.2d 60, 69 (Minn. 1997).

[17] Funchess v. Cecil Newman Corp., 632 N.W.2d 666, 672 (Minn. 2001).

[18] Albert v. Paver Calmenson & Co., 515 N.W.2d 59, 64 (Minn.Ct.App. 1994) *(citing* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 -- 50 (1986)).

[19] DHL, Inc. v. Russ, 566 N.W.2d 60, 69 (Minn. 1997).

[20] Yusefzadeh v. Ross, C.A.8 (Minn.) 1991. 932 F.2d 1261, *rehearing denied.*

four elements of a legal malpractice claim: (1) the existence of an attorney-client relationship; (2) acts constituting negligence or breach of contract; (3) that such acts proximately caused plaintiff's damages; and (4) that, but for the alleged legal malpractice, the plaintiff would have been successful in the underlying action.[21] Failure to prove any one element of the *prima facie* case of legal malpractice defeats the claim.[22] This Court found on October 18, 2005 that genuine issues of material fact existed to preclude an award of summary judgement party Another brief analysis of the four elements of a legal malpractice claim demonstrates that genuine issues of material fact continue to exist, and that summary judgment remains inappropriate, except as noted within.

As to the existence of an attorney-client relationship, there is no dispute that Plaintiff was a client of Defendant.[23]

As to the second element of the malpractice claim, acts constituting negligence or breach of contract, the parties disagree about the adequacy of representation and existence of negligence. Plaintiff argues that Defendant attorney James Hess failed to familiarize himself with the case file and the applicable law, failed to make a valuation of the case or an assessment as to damages, and had never handled an inverse condemnation case prior to Plaintiff's suit against the City of Coon Rapids. Defendants assert that they were adequately

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[21] Rohricht v. O'Hare, 586 N.W.2d 587 (Minn.Ct.App. 1998), *review denied.*

[22] Id.

[23] Michalee Rogers was dismissed as a Plaintiff in the Court's October 18, 2005 Order.

prepared for the case and negotiated the appropriate settlement for Plaintiff. Additionally, Plaintiff argued that he was coerced into the settlement eventually reached with the City of Coon Rapids.[24] Defendants argue that the legal malpractice claim alleged coercion should fail because Plaintiff voluntarily agreed to settle his claims against the City of Coon Rapids. Plaintiff argues that he was coerced into the settlement eventually reached with the City of Coon Rapids.[25] As to Defendants' preparation, factual disputes exist making summary judgment inappropriate. As to Plaintiff's claim of legal malpractice on the basis of coercion, Plaintiff has failed to provide the Court with more than a conclusory statement. Absent a factual basis for the coercion claim, Defendants' request for summary judgment on the legal malpractice claim stemming

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[24] Plaintiffs do not offer specific factual allegations of coercion, but maintain that they felt coerced by a communication from Defendants requesting that Plaintiff chose between the following three options: (1) honoring the second contract to pay the firm at least $1,000.00 per month; (2) discharging the firm and retaining a new law firm; and (3) authorizing Defendants to try and obtain settlement offers on his behalf.

[25] Defendants challenge Plaintiff's allegations of coercion and do not explicitly concede that coercion would be an indicator of negligence. Coercion is either physical force, used to compel a person to act against his will, or implied legal force, where one is so under subjection of another that he is constrained to do what his free will would refuse. *See* State ex rel. Smith v. Daniels, 118 Minn. 155, 136 N.W. 584 (Minn. 1912); *see also,* Black, Law Dict. Coercion is usually accomplished by indirect means, as threats or intimidation; physical force being more rare. Id. In this case, Plaintiff has provided no evidence of physical force, threats or intimidation.

from allegations of coercion is appropriate.[26]

The final two elements of a legal malpractice action are proximate causation and that, but for the alleged legal malpractice, Plaintiff would have been successful in the underlying action.[27] Plaintiff and Defendants have both presented evidence to address proximate causation, but given the disputed facts, the Court cannot find that either party has sufficiently supported its arguments.[28] While both parties

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[26] Plaintiff alleges that Defendants committed legal malpractice when they entered into an improper and unjust settlement and forced or coerced Plaintiff to enter into the same. *See,* Complaint, Count I, page 4, filed April 26, 2004.

[27] Proximate cause exists when but for the attorney's negligence, the loss would not have occurred, or alternatively, the loss must result directly from the attorney's tortious conduct. Raske v. Gavin, 438 N.W.2d 704 (Minn.App.1989). The issue of proximate causation is ordinarily a question of fact for a jury to decide. Id.

[28] Plaintiffs seem to assert in their Memorandum in Support of Plaintiffs Motion for Partial Summary Judgment that because a jury determined that inverse condemnation occurred, that a jury in the damages trial would have necessarily awarded damages in the amount suggested in a single appraisal prepared by Plaintiffs witness. No case law was provided in support of Plaintiffs argument that damages could be imputed in such a fashion. The Court finds Plaintiff's logic unconvincing. Defendants provide no case law on the issue of imputed damages, but instead cite case law for the proposition that malpractice claims cannot be brought by clients based solely on the inadequacy of settlement results. *See* Glenna v. Sullivan, 245 N.W.2d 869 (Minn. 1976) (client, in legal malpractice action against his former attorney to recover damages for the attorney's alleged action in negligently recommending that client accept inadequate settlement in personal injury suit, failed to produce evidence sufficient to show that award of $21,110.00 was unreasonable given the circumstances of the case or that a jury would have awarded a sum greater than $21,110.00).

submitted maps of the area, additional documentation pertaining to the plat approval process and Plaintiff's various access points to his property, and hypothetical descriptions of the property's development potential, those submissions do not change the nature of the case before the Court. Plaintiff filed suit alleging legal malpractice. In an October 18, 2005 Order, this Court denied both parties' motions for summary judgment in this legal malpractice case, reasoning that both parties presented nothing more than speculation as to what a jury would have awarded for damages. The takings and inverse condemnation claims are equally speculative as genuine issues of material fact exist. For example, Osage Street is referenced by both parties in their motion papers. The Court has evidence proving the existence of a roadway called Osage Street, but not the nature of that street. Plaintiff asserts that Osage Street is a completed cul-de-sac that provides no access to any future development of Plaintiff's property. Defendants assert that Osage Street is an unfinished "stub" that might be completed to provide any access necessary for development of Plaintiff's property. Clearly, the facts are disputed.[29]

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[29] Assuming for the purpose of argument that Plaintiff can prove the first three elements of a legal malpractice claim, leaving the fourth element (whether but for the negligence of Defendants, Plaintiff would have been successful in the underlying action) it is important to note that the original suit filed in 1996 was bifurcated. While the jury concluded that a statutory or common law dedicated road existed, the damages claim was never addressed by any court. That a road existed does not mean that Plaintiff would automatically prevail on his damages claim, or that a jury would have awarded a larger amount than the $55,000.00 settlement. No evidence was

Presenting additional information and filing a second set of motion papers does not change the issue before this Court: whether summary judgment is appropriate in this legal malpractice action. Analyzing the parties' arguments with the four elements of a legal malpractice claim in mind, this Court finds that summary judgment remains inappropriate given the particular facts of this case.

ORDER

1. Michalee Rogers is not an appropriate party to this action and her suit against Defendants is hereby DISMISSED.

2. Defendant's motion for summary judgment is GRANTED as to Plaintiff's coercion claim, referenced in Count I of Plaintiff's Complaint. As to all other claims, Defendant's motion for summary judgment is DENIED.

Dated: 20 January 2006

BY THE COURT

s/

Robert B. Varco
Judge of District Court

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presented and no testimony taken. Given those circumstances, this Court cannot find that either party would have been successful on the underlying action.

STATE OF MINNESOTA
COUNTY OF SHERBURNE

DISTRICT COURT
TENTH JUDICIAL DISTRICT

D. Eugene Rogers,

Plaintiff

File No. C3-04-915

v.

James W. Hess, Attorney at Law,
John W. Terpstra, Attorney at Law,
Ronald G. Black, Attorney at Law,
Kim E. Brandell, Attorney at Law,
and Jeffrey J. Jensen, Attorney at Law

Defendants.

Findings of Fact, Conclusions of Law and Order

The above-entitled matter came before the Honorable Robert B. Varco, Judge of District Court, Sherburne County Government Center, Elk River, Minnesota on July 21, 2006 pursuant to Plaintiff's Second Motion for Summary Judgment.

Plaintiff was represented by Richard E. Bosse.

Defendants were represented by Kelly Putney.

Plaintiff filed a Second Motion for Partial Summary Judgment and/or Motions in Limine on May 22, 2006 Plaintiff filed Motion to Amend Complaint on May 23, 2006. Defendants filed Motions in Limine on July 07, 2006. Plaintiff filed a Motion in Limine to Exclude the Anticipated Expert Testimony of Clay M. Dodd, MAI, and Terry L. Herman, PE, on July 10, 2006.

Based on the file, record, and proceedings, being fully advised, the Court makes the following:

FINDINGS OF FACT

1. On May 5, 1992, Plaintiff Eugene Rogers retained the law firm of Terpstra, Black, Brandell, Kaminsky & Hoffman to represent him in connection with a suit against the City of Coon Rapids. Plaintiff Eugene Rogers alleged his property was improperly taken by the City.[1]

2. Plaintiff signed a Contract for Legal Services on May 5, 1992.[2]

3. Defendants filed Plaintiff's suit against the City of Coon Rapids. The trial court bifurcated the proceeding. On May 3, 1996, a jury returned a Special Verdict, finding that Plaintiff's east/west access to his home is a statutorily dedicated street and common law dedicated road that the City had publicly maintained.

4. Following the conclusion of the jury trial in May 1996, Plaintiff Eugene Rogers was in debt to the law firm by more than $48,000.00. Because of the debt, Defendants and Plaintiff Eugene Rogers entered into a new Contract for Legal Services, taking into account the outstanding balance. The second contract

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[1] Memo. in Support of Pl.'s Mot. for Partial Summ. J., page 1. Plaintiffs allege that in 1992 the City of Coon Rapids approved a preliminary plat plan that landlocked Plaintiffs' homestead and 2.5 acres of developable property and obliterated ingress and egress, thus diminishing its value to almost nothing, and set backyards of the new development in Plaintiffs' front yard. Plaintiffs allege that they had not received notice of the preliminary plat approval.

[2] See Contract for Legal Services, page 1.

provides, in relevant part[3]:

> I, Doyle E. Rogers, hereby retain and employ John C. Hoffman and the law firm of TERPSTRA, BLACK, BRANDELL & HOFFMAN. I agree to pay (to be determined later) as and for a retainer. The retainer is for the following services or case: Commencement of a damage action against the City of Coon Rapids, Law Firm of Weaver, Talle & Herrick and Surveyor N.C. Holum as a result of Anoka County District Case No. CX-92-7510.
>
> The fees in this matter will be the greater of the following:
>
> 1/3 (One-third) of whatever may be recovered from said claim whether by suit, settlement or any other manner.
>
> OR
>
> The currently due sum of $48,447.35 based upon the March 3, 1997 invoice of the firm of TERPSTRA, BLACK, BRANDELL. & HOFFMAN as a result of services provided pursuant to Anoka County District Case No. CX-92-7510 plus the hourly rate noted in the paragraph below.

The retainer shall be applied to the attorney's time and services which shall be billed at the rate of $100 per hour...I

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[3] See Second Aff. of Kelly A. Putney, Ex. K, Contract for Legal Services.

understand that I will be billed for all amounts due after the monies constituting the retainer have been depleted....

Attorneys fees are due at the time of settlement, even if construed or deferred payments are involved....

In the event monies are deposited with TERPSTRA, BLACK, BRANDELL & HOFFMAN, for ultimate payment to me and I am indebted to TERPSTRA, BLACK, BRANDELL & HOFFMAN for attorneys fees or other costs, TERPSTRA, BLACK, BRANDELL & HOFFMAN may set-off my debt to it, assigning an amount equal to my indebtedness to it, from the sum payable to me.

I understand that it is my right to discharge TERPSTRA, BLACK, BRANDELL & HOFFMAN during the course of the proceeding.

I understand that I will be billed monthly and that, unless contrary arrangements are made in writing with TERPSTRA, BLACK, BRANDELL & HOFFMAN, I must satisfy my debt within thirty (30) days of the billing.

...I understand that this fee does not depend in any way upon the outcome of the case. I also understand that precise fees cannot be predicted in advance because all cases differ greatly depending upon the circumstances and personalities of the parties involved and the time involved in. pursuing the case.

...I understand that it is my right to discharge TERPSTRA, BLACK, BRANDELL &

HOFFMAN during the course of the proceeding. In the event of discharge, the billing statement will be based upon the number of hours involved through the period of representation, multiplied by the hourly billing rate, plus the balance due the firm as of March 6, 1997 invoice plus any cost advanced by the firm on my behalf.

...It is understood, that any of the following conditions shall, at TERPSTRA, BLACK, BRANDELL & HOFFMAN's option be a basis for it to withdraw from further representation as attorneys on my behalf:

...3. My failure to satisfy any periodic billings from our firm within 30 days or make satisfactory regular payments.

5. Plaintiff Eugene Rogers signed the second contract on April 13, 1997 and received a copy of the agreement on May 8, 1997.

6. Plaintiff claims that, after the jury verdict in 1996, Defendants recommended and persuaded him to purchase 37 1/2 acres, which was contiguous to Plaintiff's 2 1/2 acres of property.[4] Plaintiff claims that Defendants recommended and advised this purchase so Plaintiff would be insured access to his property.[5] On June 20, 1997, Plaintiff recorded a Contract for Deed dated June 19, 1997 between Plaintiffs Doyle E. and Michalee Rogers and Edward C. and Marie

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[4] Aff. of D. Eugene Rogers, July 27, 2005; Supplemental Memo. In Supp. of Pl.'s Second Mot. For Partial Summ. J. and/or Mots. in Limine, June 9, 2006.

[5] Id.

Wortman for the purchase of approximately 37 1/2 acres of land adjoining Plaintiff's original property.[6]

7. An action for damages against the City was started in 1997 by the Defendants on behalf of Plaintiff, asserting damage claims for inverse condemnation, negligence and a violation of 42 U.S.C. § 1983. The action was removed to Federal Court on June 4, 1997. At this time, Attorney John Hoffman was the primary attorney working on Plaintiff Eugene Roger's case.

8. Shortly after commencing the second lawsuit, Attorney John Hoffman was appointed to the bench in the Tenth Judicial District of Minnesota. Defendant Hess took over primary responsibility for the case.

9. In August 1997, Defendant Hess attended a Scheduling Conference with United States District Court Judge Paul Magnusson. Defendants assert that at the scheduling conference, Judge Magnusson indicated he was skeptical of the viability of Plaintiff's claim under 42 U.S. C. § 1983.[7]

10. According to Defendants, Defendant Hess met with Plaintiff to discuss the firm's ongoing representation of him, in light of continuing outstanding fees. Plaintiff was advised that he could either (1) honor the second contract to pay

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[6] Third Aff. of Kelly A. Putney, Ex. B, Contract for Deed - Wortman Property.

[7] Second Aff. of Kelly A. Putney, Ex. U, Hess Deposition, pages 16-17.

the law firm at least $1,000.00 per month; (2) discharge the firm and obtain a new lawyer; or (3) authorize the law firm to try and obtain settlement offers on his behalf.[8]

11. Defendants maintain that Plaintiff authorized settlement efforts on his behalf.

12. Settlement negotiations were conducted with the City of Coon Rapids. On January 26, 1998, Defendant Hess advised Plaintiff that the City had offered to settle the case for $50,000. Defendant Hess requested authority from Plaintiff to demand $55,000 and stated that the firm would accept $20,000 as reduced payment for its outstanding fees, which totaled approximately $55,000 at that time.[9]

13. Defendant Hess wrote a second letter to Plaintiff addressing the settlement authorization on February 3, 1998.[10]

14. On February 24, 1998, Plaintiff signed a Settlement Agreement and General Release agreeing to accept $55,000 from the City of Coon Rapids to settle his damages claims.[11] The Settlement Agreement and General Release signed by Plaintiff states, in relevant part:

Whereas it is the desire of Rogers and the

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[8] Hess Depo., pages 46-47, 54-55; Black Depo., pages 46-47; Brandell Depo., pages 1920.

[9] Second Aff. of Kelly A. Putney, Ex. P, Letter from James W. Hess to Eugene Rogers dated January 26, 1998.

[10] Id. at Ex. Q, Letter from James W. Hess to Eugene Rogers dated February 3, 1998.

[11] Id. at Ex. R, Settlement Agreement and General Release dated February 14, 1998.

City to fully and completely resolve, settle and compromise any and all claims existing between them in order to avoid the expense and uncertainly of further litigation, and for no other purpose...

NOW, THEREFORE, THE UNDERSIGNED IN CONSIDERATION OF THE FOREGOING AND OF THE PROMISES AND AGREEMENTS SET FORTH BELOW, HEREBY AGREE, PROMISE AND PLEDGE AS FOLLOWS:

1. THE CITY:

   a. In exchange for the dismissals in Paragraph 2 below, the City shall pay to Rogers the sum of Fifty-Five Thousand Dollars ($55,000).

   b. The east-west access from Partridge Street to Rogers' homestead as determined by the jury in Anoka County District Case No. CX-92-7510 shall continue to exist as a public road and be maintained by the City in accordance with standard City practice and procedures.

2. ROGERS:

   a. Rogers will dismiss with prejudice any and all claims of any kind against the City of Coon Rapids without costs, attorneys fees or disbursements to either party, including any claim for the costs and

disbursements from Anoka County Judgment Court File VX-92-7510.

b. Rogers will dismiss with prejudice his claims against N.C. Hoium in this matter and obtain a dismissal with prejudice of Hoium's cross-claim against the City.

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4. Consultation with attorney: The parties represent with their signatures that they have read the terms of this agreement in full, have had the opportunity to consult with their attorneys, understand the terms of this Agreement, and agree to be bound thereby in full.

5. Release: Rogers, on behalf of himself, his successors and assigns, hereby releases and discharges any and all claims, demands or causes of action, whether known or unknown or of any manner or description, which he has or may have against the City of Coon Rapids, its officers, agents and employees, which exist as of the date of the execution of this Agreement.[12]

15. On March 23, 1998, Plaintiff received a check from Defendants' law firm in the amount of $35,000. Defendants' law firm retained $20,000 from the settlement to satisfy the balance of

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[12] Id.

unpaid attorneys fees.[13]

16. Plaintiff filed a Complaint on April 26, 2004 on the grounds that Defendants coerced him into the settlement, and that a reasonable jury would have awarded him substantially more than the $55,000.00 received from the City.[14] Plaintiff sought damages in excess of $50,000.00.

17. Plaintiff filed a Notice of Motion and Motion for Partial Summary Judgment on May 5, 2005 and Defendants filed a Notice of Motion and Motion for Summary Judgment on June 9, 2005. Both Summary Judgment motions were denied by this Court in an Order filed October 18, 2005.

18. Defendant filed a second Notice of Motion and Motion for Summary Judgment on December 13; 2005 on the grounds that Plaintiff cannot establish that "but for" Defendants' alleged negligence (allegedly coercing Plaintiff into settling) he would have prevailed at trial.[15] The Court granted Defendants' motion for summary judgment as to Plaintiff's coercion claim. As to all other claims, the Court denied Defendants' motion for summary judgment. The Court also concluded that Michalee Rogers was not an appropriate party to the action and dismissed her suit against Defendants.

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[13] Id. at Ex. S, Letter from James W. Hess to Eugene Rogers dated March 23, 1998 with three enclosures (trust account check for $35,000, original signed copy of Settlement Agreement and General Release, and 4 copies of the settlement check).

[14] See Memo. in Support of Pl.s' Mot. for Summ. J., page 2.

[15] See Def.'s Memo. of Law in Support of Mot. for Summ. J., page 2, filed December 13, 2005.

19. On May 23, 2006, Plaintiff filed a Notice of Motion and Motion to Amend Complaint, requesting leave to insert damages for the 37 1/2 acres and leave to insert the word "pressuring" in the prior place of "coercion."

20. On July 07, 2006, Defendants filed a Notice of Motion and Motions in Limine requesting the Court to exclude the introduction of or reference to the following at trial:

    a. All evidence regarding Plaintiff's purchase of 37 1/2 acres of land, which he now claims gives rise to an additional measure of damages;

    b. The testimony of Plaintiff's experts Michael Hoover and Robert Kalenda on the basis that their testimony is duplicative of Steven Sunde;

    c. The testimony of Plaintiffs expert Ronald Peterson regarding his opinions on the current wetland delineation of Plaintiffs property; and

    d. The testimony of Plaintiff's purported expert Mark Kleckner regarding the value of Plaintiff's property.

21. On July 10, 2006, Plaintiff filed a Notice of Motion and Motion in Limine to Exclude the Anticipated Expert Testimony of Clay M. Dodd, MAI, and Terry L. Herman, PE.

20. On July 13,. 2006, Plaintiff filed a Notice of Second Motion and Motion for Partial Summary Judgment and/or Motions in Linme, moving the Court for partial summary judgment on the following issues of material

fact:

a. That the Defendants' testimony of a subsequent oral agreement or modification of the second fee agreement of May 1996 that Mr. Rogers would pay $1,000 per month is precluded by the Statute of Frauds;

b. That the Plaintiff is entitled to damages on the loss of the use of his 37 1/2 acres purchased prior to the Defendants' breaches and malpractice;

c. That the Plaintiff is entitled to damages of emotional distress which could have been recovered in the underlying action under Section 1983 and to attorney fees which would have been recovered in the underlying action under Section 1983 and Minn. Stat. § 117.05; and

d. That in the underlying action, the City did not give Rogers notice of the proposed Plat of Shenandoah and by denying him proper access and creating a cul-de-sac, as a matter of law he has suffered injury and damage.

CONCLUSIONS OF LAW

The parties raise a number of issues in both their briefs and at the July 21st hearing. The Court will address each.

I. PLAINTIFF'S MOTION TO AMEND COMPLAINT

Rule 15.01 of the Minnesota Rules of Civil Procedure governs amendments to complaints. A party may freely amend a pleading within 20 days

after it is served.[16] Otherwise, the party seeking amendment must obtain leave from the Court or by stipulation of the opposing party.[17] The Court should grant leave when justice so requires unless the other party would be prejudiced.[18] Courts should construe Rule 15[19] liberally so that cases may be decided on their merit.[20] The Court should deny a motion to amend when the proposed amendment does not state a claim,[21] or when it would be futile.[22] In addition, the Court should deny a motion to amend when the additional claim or amendment could not survive the summary judgment standard.[23]

A. Plaintiff's request to amend paragraph 17(e) of the Complaint changing "coercion" into "pressuring"

Plaintiff alleges that he felt coerced to sign the settlement agreement because (1) Defendants

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[16] Minn. R. Civ. P. 15.01 (2006).

[17] Id.

[18] Rhee v. Golden Home Builders, Inc., 617 N.W.2d 618, 621 (Mimi Ct. App. 2000).

[19] Minn. R. Civ. P. 15.01 (2006).

[20] Roberge v. Cambridge Cooperative Creamery, Co., 67 N.W.2d 400, 403 (1954); see also Minn. R. Civ. Proc. 1 (2006) (stating that "[the rules] shall be construed to secure the just, speedy, and inexpensive determination of every action").

[21] Eisert v. Greenberg Roofing & Sheetmetal Co., 314 N.W.2d 226, 228-29 (Minn. 1982).

[22] See Utecht v. Shopko Department Store, 324 N.W.2d 652, 654 (Minn. 1982) (indicating that courts should deny motions to add non-meritorious claims which may prejudice the opposing party by causing delay and unnecessary expense).

[23] Bebo v. Delander, 632 N.W.2d 732, 740 (Minn. Ct. App. 2001).

threatened to put a $60,000 lien on his property[24] (2) and because he was "broke."[25] Plaintiff now would like to amend his Complaint to reflect that he felt "pressured" to sign the agreement because of these two above-mentioned factors. In support thereof, Plaintiff cites to *Virsen v. Russo*[26] and *Oakes and Kanatz v. Schmidt*.[27]

Virsen and *Schmidt* both mention the term "pressure" in relation to a malpractice claim on an underlying settlement agreement. Neither case supplies predicate facts upon which this Court could analyze.

However, the Court does find the term "pressure" applicable to Plaintiff's allegation (1), as mentioned above. Typically, a person has a right to threaten legal process in order to enforce a lawful demand.[28] "But one has no right to threaten another, in order to accomplish an ulterior purpose, . . . with an action to enforce some just legal demand where the purpose is not to enforce the demand, but rather by exceeding the needs for enforcement thereof to so use legal process as to oppress his adversary and to cause him unnecessary hardship."[29]

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[24] Aff. of Richard E. Bosse, Ex. E, Dep. of Eugene Rogers, p. 211, lines 3-12, filed May 5, 2005. Specifically, Plaintiff states: "I signed it under coercion, yes, because he coerced me. Like I said, threatened me to [sic] put a $60,000 lien on my property." Id.

[25] Id. at p. 213, lines 4-12.

[26] 356 N.W.2d 333 (Minn. Ct. App. 1984).

[27] 391 N.W.2d 51 (Minn. Ct. App. 1986).

[28] Zimmerman v. Benz, 202 N.W. 272, 272 (Minn. 1925).

[29] Wise v. Midtown Motors, 42 N.W.2d 404, 406 (Mimi. 1950); see also Snyder v. Samuelson, 167 N.W. 287, 289 (Mimi. 1918).

In *Wise v. Midtown Motors,*[30] the court found the facts there to fall into the latter situation as mentioned. The court concluded that defendants executed a contract because: plaintiff threatened to commence a lawsuit which would cause [defendants] to 'lose everything' and which would cost them more than the amount of the contract; and these threats were repeated, in the absence of the defendants' counsel, when the contract was signed.[31]

Under the facts, Defendants could have pursued a lien against Plaintiff's property,[32] which would be a lawful demand. However, the Court finds that Plaintiff's situation in this case is closely analogous to *Wise.* As Plaintiff alleges, Defendants threatened to place a $60,000 lien on his property. At the time of settlement, Plaintiff alleges that he was broke. A $60,000 lien would most probably, under the alleged facts, make Plaintiff lose everything he had. Plaintiff claims that Defendants informed him that they would accept $20,000 as full payment for Plaintiff's outstanding balance, if he signed the settlement agreement. The alleged $60,000 lien is grossly disproportional to the $20,000; the lien amount is more then the oral agreement of $20,000. Further, in *Wise* the threats at issue were made in the absence of counsel. The situation here is worse, the threats were allegedly made by Plaintiff's counsel (Defendants) to Plaintiff.

In interpreting *Wise,* the court in *Kassan*

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30 Wise, 42 N.W.2d at 404.

31 Id.

32 See Minn. Stat. § 481.13 (2004) (setting forth the requirements concerning liens for attorney's fees)

Realty Co. v. Metzen Realty[33] stated that in order for *Wise* to apply the threatening party must have an ulterior motive for his or her actions.[34] But, *Wise* makes clear that this issue is a fact question,[35] which is suited for a jury's determination.[36]

Under the facts as Plaintiff alleges, it is plausible that Defendants' action to enforce some just legal demand exceeded the need for enforcement thereof and Defendants threatened to use legal process to oppress Plaintiff and thereby to cause him hardship. Plaintiff's request to amend his Complaint to add the term "pressure" is not futile and such an assertion does state a claim under the facts as Plaintiff presents to the Court. Plaintiff's request is hereby granted.

B. Plaintiffs amendment to add 37 1/2 acres

Plaintiff wishes to amend paragraph 22 of his Complaint and thereby add the following: "That due to the negligence of the Defendants, the Plaintiff has lost the use of his homestead with 2 1/2 acres and has lost the value of his homestead with 2 1/2 acres including its development and has lost the value of the contiguous 37 1/2 acres . . . ." Defendants claim that by amending the Complaint as mentioned, the Plaintiff would be asserting a new claim. Based on

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[33] 1999 WL 1102299, 2 (Minn. Ct. App. 1999).

[34] Id.

[35] Wise, 42 N.W.2d at 406.

[36] It is not unreasonable to imagine that Defendants' alleged threat did serve an ulterior motive, i.e., insuring that Plaintiff would settle the suit so the firm would insure payment on Plaintiffs outstanding balance.

Plaintiff's Affidavit, he claims that Defendants advised him and persuaded him to buy the 37 1/2-acre property. He also claims that Defendants assisted him with this purchase during the same time Defendants were handling his other matter. Plaintiff claims that Defendants advised him to purchase the land so he would have access to his original property; the same original property as to which Defendants were rendering legal services to Plaintiff. Taking Plaintiff's statements as true, which the Court must do at this stage of the proceedings, the Court finds that the Plaintiff's purchase of the 37 1/2 acres arose out of the same set of factual circumstances and connected series of transactions as the underlying case in his malpractice claim. This is not a new claim.

Defendants claim that if the Court were to allow Plaintiff to make his amendment they would be unfairly prejudiced. Trial is still months away and the 37 1/2 acres has been an issue in this case for some time. Defendants are not prejudiced.

Defendants argue that the statute of limitations bars any claim concerning the 37 1/2 acres since Plaintiff purchased the land in 1997. Rule 15.03 provides that "[w]henever the claim or defense asserted in the amended pleading *arose out of the conduct, transaction, or occurrence* set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading."[37] This Court has not found the statute of limitations to bar Plaintiff's malpractice claim, as he set forth in his original pleading. The statute of limitation does not bar any claim concerning the 37 1/2 acres since it arose out of the same factual

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[37] Minn. R. Civ. Proc. 15.03 (2006) (emphasis added).

circumstances, as the original pleading.

Finally, any future claim Plaintiff may have against the Defendants regarding the 37 1/2 acres would most probably be barred by the doctrine of res judicata, since it arose out of the same transaction or occurrence for which he makes his legal malpractice claim.[38] Plaintiff should be allowed to amend his Complaint so this matter may be decided on its merits, otherwise he may be prejudiced.

II. DEFENDANTS MOTIONS IN LIMINE

A. Excluding the introduction of or reference to all evidence regarding Plaintiff's purchase of 37.5 acres of land, which he now claims gives rise to an additional measure of damages

Under Rule 403 of the Minnesota Rules of Evidence, the Court can exclude evidence on the grounds of prejudice, confusion, and waste of time.[39] In accordance with Section I.B. of this Court's current Order, Plaintiff is allowed to amend his Complaint in regards to the 37 1/2 acres. Because of the amendment, it would be unreasonable for the Court to exclude Plaintiff from making reference to the 37 1/2 acres. Although this case presents a number of issues, reference to the 37 1/2 acres will not produce confusion, and due to the amendment, it will not waste time. Defendants' motion is denied.

B. Excluding the introduction of or reference to the testimony of Plaintiffs experts Michael Hoover and Robert Kalenda on the basis that their testimony is duplicative of Steven

[39] Minn. R. Evid. 403 (2006).

Sunde

Defendants' contention on this point is not that Mr. Hoover and Mr. Kalenda are unqualified, but rather that their testimony will add nothing new. Under Rule 402 of the Minnesota Rules of Evidence, the Court may exclude evidence if its "probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."[40] To the extent that Mr. Hoover's and/or Mr. Kalenda's testimony does in fact replicate that of Mr. Sunde, Plaintiff would be prevented from presenting that testimony for reasons set forth in Rule 402. At this point in the proceedings, the Court is unable to ascertain whether Mr. Hoover's or Mr. Kalenda's testimony will in fact duplicate that of Mr. Sunde. Therefore, the Court will not grant Defendants' motion at this time.

C. Excluding the introduction of or reference to the testimony of Plaintiff's expert Ronald Peterson regarding his opinions on the current wetland delineation of Plaintiff's property

Defendants claim that Ronald Peterson's testimony is irrelevant because it concerns how the property might be delineated today, not at the time of the dispute under issue. Rule 401 of the Minnesota Rules of Evidence defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the

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[40] Id.

determination of the action more probable or less probable than it would be without the evidence.'"[41] The Minnesota Supreme Court has stated "any evidence is relevant which logically tends to prove or disprove a material fact in issue."[42]

Plaintiff purports Mr. Peterson's testimony to be as follows:

> The 2005 wetland delineation performed by PEC accurately depicts that the subject parcel lacked wetlands not only in 2005 but at all times since the significant hydrologic modification that occurred in the mid-1980s (i.e. in 1997). The 2005 PEC delineation was performed using the wetland delineation manual that was in use in 1997 and appropriately recognized the hydrologic modifications incurred by wetlands along Coon Creek. All of the hydrologic alterations that were observed and considered in 2005 also existed in 1997.[43]

As Defendants note, the Plaintiff needs to prove in the underlying claim that (1) his 2 1/2 acres and now the 37 1/2 acres were developable in the 1990's, and (2) how much he would have profited from the development.[44] At least from the early stages of this proceeding, it would appear that Mr. Peterson's testimony, as purported, would make it more or less

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[41] Minn. R. Evid. 401 (2006).

[42] Boland v. Morrill, 132 N.W.2d 711, 719 (1965).

[43] Pl.'s Mem. of Law in Opposition to Def.'s Mots. in Limine, filed July 17, 2006.

[44] Def.s' Memo. of Law in Supp. of Their Mots. in Limine, filed July 7, 2006.

probable that element (1) exists. Therefore, the Court will not grant Defendants' motion at this time.

D. Excluding the introduction of or reference to the testimony of Plaintiff's purported expert Mark Kleckner regarding the value of Plaintiff's property.

In determining whether to qualify a witness as an expert, the Court must consider the knowledge, skill, experience, training, and/or education of the individual.[45] Defendants claim that this Court should exclude Mark Kleckner from testifying as an expert because he is not a licensed appraiser and has not had any experience or education in the valuation of property. In support thereof, Defendants cite to *WLPT Cliff Six, LLC v. County of Dakota.*[46] In that case, the court determined that a real estate agent was not qualified as an expert for appraisal purposes because, although he was experienced in real estate investment, he did not have experience in valuation and appraisal techniques.[47]

In the present matter, Mr. Kleckner states "in my profession as a real estate developer and broker, [] I have extensive experience in performing appraisals of residential, commercial and real estate lots and developments. In my seventeen (17) years of experience I have performed such appraisals and analysis for many clients."[48]

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[45] Id. at 702.

[46] 2003 WL 222037632 (Minn. Tax Ct. 2003).

[47] Id. at * 3.

[48] Third Supp. Aff. of Mark M. Kleckner of July 14, 2006, filed July 17, 2006.

Unlike the real estate agent in *WLPT Cliff Six,* Mr. Kleckner indicates that he has experience in valuation and appraisal techniques. The Minnesota Supreme Court has stated, for purposes of expert qualification, experience is often more persuasive than education or certification.[49] The Court will not exclude the expert testimony of Mr. Kleckner at this time.

III. PLAIN TIFF'S MOTION IN LIMINE TO EXCLUDE THE ANTICIPATED EXPERT TESTIMONY OF CLAY M. DODD, MAI, AND TERRY L HERMAN, PE

Plaintiff seeks to exclude the expert testimony of Mr. Dodd and Mr. Herman on grounds that they lack sufficient qualification to render opinions relative to wetland science. As previously mentioned, the Court must consider the knowledge, skill, experience, training and/or education of the individual when determining whether to certify him or her as an expert.[50]

The purpose of Mr. Dodd's and Mr. Herman's testimony is to provide opinions regarding the valuation and condition of the property at issue.

Mr. Dodd performed a Market Value Appraisal of Mr. Roger's property when the City of Coon Rapids law suit was pending.[51] Mr. Herman's curriculum vitae indicates that he is experienced in sewer and drainage systems, especially those in the Coon Rapids area.[52] This indicates that Mr. Dodd and Mr. Herman

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[49] Lundgren v. Eustermann, 370 N.W.2d 877, 880 (Minn.1985)

[50] Minn. R Evid. 702 (2006).

[51] Affidavit of Clay M. Dodd, filed July 10, 2006.

[52] Curriculum Vitae of Tern/ L. Herman, P.E., filed July 10,

have experience to testify as to matters regarding the value and construction of the property at issue. For the foregoing reasons, the Court will not exclude the testimony of Clay M. Dodd, MAI, and Terry L. Herman, PE, at this time.

IV. PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND/OR MOTIONS IN LIMINE

Summary judgment is appropriate "if the pleading, depositions, answers to interrogatories and admissions on file ... show that there is no genuine issue as to any material fact and that either party is entitled to judgment as a matter of law."[53] Minnesota courts have emphasized that summary judgment is a blunt instrument that should be employed "only where it is perfectly clear that no issue of material fact is involved."[54] Summary judgment should not be granted where reasonable minds could draw different conclusions from the evidence.[55] The evidence must be considered in a light most favorable to the non-moving party, and any doubts about material facts are resolved in its favor.[56] The non-moving party's evidence must be significantly probative, not merely colorable.[57]

2006.

[53] Minn. R. Civ. P. 56.03 (2006).

[54] Donnay v. Boulware, 144 N.W.2d 711, 716 (Minn. 1966).

[55] DHL, Inc. v. Russ, 566 N.W.2d 60, 69 (Mimi. 1997).

[56] Funchess v. Cecil Newman Corp., 632 N.W.2d 666, 672 (Minn. 2001).

[57] Albert v. Paper Calmenson & Co., 515 N.W.2d 59, 64 (Minn. Ct. App. 1994) (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-50 (1986)).

A. The Defendants' testimony of a subsequent oral agreement or modification of the second fee agreement of May 1996 that Mr. Rogers would pay $1,000 per month is precluded by the Statute of Frauds

Plaintiff claims that the second written fee agreement of May 1996 is within the statute of frauds because it was a service contract that may not be preformed within one year from the making thereof and it was not in writing and subscribed by the party charged therewith. Although Plaintiff may be correct in his characterization of the agreement, the parol evidence rule is not necessarily violated by testimony of subsequent discussions relating to alterations of the original contract.[58] In the present matter, the Plaintiff signed the May 1996 agreement, although subsequent terms concerning the $1,000 monthly payments were not inserted therein.

> Restatement (Second) of Contracts provides that:
>
> (1) An oral agreement is not superseded or invalidated by a subsequent or contemporaneous integration, nor a written agreement by a subsequent integration relating to the same subject-matter, if the agreement is not inconsistent with the integrated contract, and
>
> (a) is made for separate consideration, or
>
> (b) is such an agreement as might naturally be made as a separate agreement by parties

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[58] Duffy v. Park Terrace Supper Club, Inc., 206 N.W.2d 24, 25 (Minn. 1973).

situated as were the parties to the written contract.

(2) Where no consideration is stated in an integration, facts showing that there was consideration and the nature of it, even if it was a promise, or any other facts that are sufficient to make a promise enforceable, are admissible in evidence and are operative.

The May 1996 agreement indicated that Plaintiff would pay Defendants for the services they rendered. The agreement to pay $1,000 per month is not inconsistent with that agreement. Both parties were to later agree on the retainer fee amount. This fact indicates that the contract was not fully integrated. Consideration is satisfied by the fact that the Defendants allowed the Plaintiff to pay the sum over an extended period of time, rather than pay the entire lump sum at once.

In addition, the agreement to pay the $1,000 per month may be a modification of the previously billed months and the 30-day time frame for payment. "An oral agreement that modifies the method or time for performance is valid and not subject to the statute of frauds."[59] There is a difference "between the contract itself, which is within the purview of the statute, and the subsequent performance, which is not."[60] The Court will not grant Plaintiff's motion for summary judgment and/or motion in limine on this claim.

B. The Plaintiff is entitled to damages on the loss of the use of his 37 1/2

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[59] Estate of Giguere, 366 N.W.2d 345, 347 (Minn. Ct. App. 1985).

[60] Id.

acres purchased prior to the Defendants' breaches and malpractice

Whether Plaintiff is entitled to damages is a question of fact for the jury and not a question of law.[61] Plaintiff may seek damages in connection with the property, but it would be wrong for the Court, on a motion for summary judgment, to conclude that Plaintiff is *entitled* to damages.[62]

C. The Plaintiff is entitled to damages of emotional distress which would have been recovered in the underlying action under Section 1983 and to attorney fees which would have been recovered in the underlying action under Section 1983 and Minn. Stat. § 117.05

Damages for emotional distress are available in an attorney malpractice claim only where the plaintiff can prove a direct violation of his or her rights by willful, wanton or malicious conduct; mere negligence will not suffice.[63] In the present matter, the Plaintiff only complains that the Defendants were negligent. Thus, damages for emotional distress are improper as they relate to the alleged breach. Minnesota law also indicates that attorney fees are

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[61] Vilett v. Moler, 84 N.W. 452, 453 (Minn. 1900).

[62] See 4A Minnesota District Judges Association, Minnesota Practice, Jury Instructions Guides - Civil JIG 90.15 (4th ed. 1999) ("A party asking for damages must prove the nature, extent, duration, and consequences of his or her injury.").

[63] Lickteig v. Alderson, Ondov, Leonard & Sween, P.A., 556 N.W.2d 557, 562 (Minn. 1996).

not recoverable as to the alleged malpractice claim.[64]

As to the underlying claim giving rising to the malpractice claim, Minnesota law indicates that attorney fees are recoverable, but only to the extent of those fees that actually were incurred.[65] As to damages for emotional distress in the underlying claim, the outcome is different.

Essentially, Plaintiff is requesting that the underlying tortfeasor's (i.e., City of Coon Rapids) liability transfer to the Defendants/attorneys in this action. One of the purposes for granting relief in an emotional distress case is to punish the wrongdoer for his or her outrageous conduct. Imposing liability on the attorneys in this matter would not serve the social purpose of deterring this improper conduct.[66]

In addition, a claim for emotional distress as a result of inverse condemnation is remote[67] and any award would be speculative at best.[68] For the

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[64] Fulton v. Schermer, 2002 WL 485185, *2 (Minn. Ct. App. 2002).

[65] Admiral Merchants Motor Freight, Inc. v. O'Connor & Hannan, 494 N.W.2d 261, 267 (Minn. 1992) (stating that in Minnesota malpractice cases, attorney fees incurred in the underlying dispute constituting the alleged malpractice are recoverable); see also Hill v. Okay Construction Co., 252 N.W.2d 107, 121 (Minn. 1977) (same).

[66] For a discussion on this issue, see Charles Marshall Thatcher, Recovery of Lost Punitive Damages as Compensatory Damages in Legal Malpractice Actions: Transference of Liability or Transformation of Character?, 49 S.D. L. REV. 1 (2003).

[67] See City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687,749 n.10 (discussing the implausibility of emotional distress as a proper element of damages in an inverse condemnation proceeding).

[68] Leoni v. Bemis Co., Inc., 255 N.W.2d 824, 826 (Mimi. 1997)

foregoing reasons, the Court denies Plaintiff's claim for damages related to emotional distress,[69] but grants Plaintiff's claim to seek attorney fees as they relate to the underlying action.

D. That in the underlying action, the City did not give Rogers notice of the proposed Plat of Shenandoah and by denying him proper access and creating a cul-de-sac, as a matter of law he has suffered injury and damage

Minn. Stat. § 462.358, subd. 3b provides that "publication of notice of time and place [of the hearing] in the official newspaper at least ten days before the day of the hearing is the only notice required.[70] There is no indication that personal notice is required.

As indicated by Defendants' exhibit, the city published notice as statutorily required.[71] Plaintiffs claim is barred under these facts: The Court denies Plaintiff's request for summary judgment on this issue.

ORDER

1. Plaintiff's Motion to Amend his Complaint is GRANTED. Plaintiff may amend his Complaint in reference to the 37 1/2 acres and

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(stating that "damages which are speculative, remote, or conjectural are not recoverable").

[69] Piscetelli v. Friedenberg, 105 Cal. Rptr.2d 88, 108 (Cal. Ct. App. 2001) (stating that "[w]e cannot, as a matter of policy, justify an award intending to punish a wrongdoer"); see also Ferguson v. Lieff, Cabraser, Heimann, and Bernstein, 135 Cal. Rept.2d 46, 56 (Cal. 2003) (same).

[70] Minn. Stat. § 462.358, subd. 3b (2004).

[71] Semrow Aff., Ex. D, filed July 14, 2006.

the term "pressure."

2. Defendants' Motions in Limine are DENIED.

3. Plaintiff's Motion to exclude the anticipated expert testimony of Clay M. Dodd, MM, and Terry L. Herman, PE, is DENIED.

4. Plaintiff's Motion for Summary Judgment and/or Motion in Limine that the Plaintiff is entitled to attorney fees which would have been recovered in the underlying action under Section 1983 and Minn. Stat. § 117.05 is GRANTED to the extent that Plaintiff may seek such fees if he is successful on the underlying claim, and only to the extent of those fees actually incurred. Plaintiff's other Motions for Summary Judgment and/or Motions in Limine are DENIED.

Dated: 21 August 2006

BY THE COURT

s/_____

Robert B. Varco
Judge of District Court

STATE OF MINNESOTA
COUNTY OF SHERBURNE

DISTRICT COURT
TENTH JUDICIAL DISTRICT

D. Eugene Rogers,
Plaintiffs,

File No. C3-04-915

v.

James W. Hess, Attorney at Law,
John W: Terpstra, Attorney at Law,
Ronald G. Black, Attorney at Law,
Kim E. Brandell, Attorney at Law,
and Jeffrey J. Jensen, Attorney at Law
Defendants.

ORDER

On January 9, 2007, the above-entitled matter came before the Honorable Robert B. Varco, Judge of District Court, for a motion hearing.

Richard E. Bosse, Esq., appeared on behalf of Plaintiff, who was also present.

Kelly A. Putney, Esq., appeared on behalf of Defendants:

The hearing was held pursuant to Defendants' motion for taxation of costs and disbursements and Plaintiff's motion for new trial.

Based on the file, record, and proceedings, being fully advised, the Court makes the following:

FINDINGS OF FACT

1. This case concerned a legal malpractice claim. Plaintiff alleged Defendants were negligent in representing him on an underlying case. Specifically, Plaintiff claimed that Defendants failed to properly investigate, conduct discovery, and assess Plaintiff's damages as they related to

this underlying claim. In addition, Plaintiff claimed Defendants pressured him into settling his claim.

2. On November 6, 2006, a jury trial commenced in this action. At the close of Plaintiffs case-in-chief, Defendants moved for judgment as a matter of law and the Court granted that motion.

3. In granting Defendants' motion, the Court found that Plaintiff failed to produce enough evidence to establish that "but for" Defendants'[1] actions Plaintiff would have been successful in his underlying case.

4. On December 22, 2006, Defendants filed with this Court a motion for taxation and costs. Defendants supported their motion with appropriate affidavits and invoices attesting to the costs and disbursements they actually incurred. As otherwise noted below, the Court finds the following claimed expenses reasonable and necessary to defend against Plaintiff's claims:

A.	Statutory Costs:	$200.00
B.	Court Fees:	
	a. Filing Fee:	$245.00
	b. Motion Fees	$730.00
	Total =	$975.00[2]

[1] It is worth noting that Plaintiff sued each Defendant attorney individually, rather than the firm. Plaintiff failed to adduce any evidence as to the actions of Jeffrey J. Jensen, John W. Terpstra, and Kim E. Brandell. Plaintiff conceded, during trial, that these individuals should be dismissed from the case.

[2] Defendants failed to submit an invoice or bill for these costs.

C. Deposition Transcript Expenses:

a.	Eugene Rogers (Volume I):	$752.26
b.	Eugene Rogers (Volume H):	$447.56
c.	Ron Black	$386.20
d.	James Hess (Volume I):	$224.70
e.	James Hess (Volume II):	$79.60
f.	Jeff Jensen:	$116.60
g.	Kim Brandell:	$133.40
h.	John Hoffman:	$628.50
	Total =	$2,768.82

D. Mediation Fees: $1,325.00[3]

E. Legal Process Service:

a.	Douglas Vierzba:	$89.00
b.	Al Hofstedt:	$38.69[4]
	Total =	$127.69

F. Expert Witness Fees:

a.	John McDonald:	$19,159.43
b.	Clay Dodd:	$8,052.50
c.	Terry Hermann:	$6,405.82
d.	George Hoff:	$2,932.50
e.	Frank Svoboda:	$2,952.18
	Total =	$39,502.43

G. Trial Exhibits:

a. K&B Copy Services (blow ups) $847.44

However, the Court takes judicial notice of these fees.

[3] According to the invoice for this claimed cost, the original bill was $2,650.00. The mediator, however, split the balance between the parties. Thus, Plaintiff was billed $1,325.00 and Defendant was billed $1,325.00. For reasons stated in the Conclusions of Law, it is counter-intuitive to award a prevailing party this expense.

[4] Defendants failed to provide an invoice or bill for this cost. It is unknown if this expense was actually incurred, or even if it was necessary. Thus, this cost will not be awarded.

b.	K&B Copy Services (blow ups)	$597.06
c.	Albinson Printing	$230.06
d.	In Tune Document Services	$66.00
e.	Tierney Bros. (camera rental)	$581.02
f.	Internal photocopies:	$164.60
	Total =	$2,486.18

H. Other Disbursements:

a.	Copy of underlying file:	$682.40
b.	Photocopies (discovery, etc.):	$2,472.60[5]
c.	Mileage to and from motions, conferences, and trial:	$591.61[6]
d.	Telephone toll charges:	$50.10[7]
	Total =	$3,796.71

Overall Total = $51,181.83[8]

5. On December 29, 2006, Plaintiff filed with this Court a motion for new trial. The grounds upon which Plaintiff seeks a new trial are as follows:

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[5] Defendants failed to provide invoices or copies of bills relating to this cost. But, due to the fact that these charges relate to internal copying, it is doubtful that an internal bill was ever generated. The amount claimed is reasonable and necessary given the extent of documents produced for this case.

[6] Defendants failed to provide invoices or copies of bills relating to these costs. Furthermore, for reasons cited below, these costs will not be awarded.

[7] Defendants failed to provide invoices or copies of bills relating to this cost. But, it is reasonable that long distance telephone calls would have been necessary, especially due to the number of expert witnesses and the location of Plaintiff's counsel's office. The amount claimed is reasonable and necessary.

[8] Defendants claim that the combined total of all costs and disbursements equals $51.981.70. It is unknown how Defendants arrived at this figure. The correct calculation should be $51.181.83

1. The Court erred in ruling, as inadmissible, the testimony of Eugene Rogers and Mark Kleckner and evidence thereon as to Plaintiff's damages in regards to the additional 37.5 acres Plaintiff purchased; and
2. The Court erred in ruling, as inadmissible, the testimony of Eugene Rogers as to admissions made by agents/employees of the City who were defendants in the underlying action.

ISSUES

1. Did the Court err, and should a new trial be granted, on the following grounds:
   a. The exclusion of evidence and testimony as it related to Plaintiff's 37.5 acres
   b. The exclusion of statements made by agents/employees of the City who were defendants in the underlying action.
2. Were Defendants' claimed costs and disbursements reasonable and necessary to defending against Plaintiff's action?

CONCLUSIONS OF LAW

I.

Motions for a new trial should be granted cautiously and sparingly and only in furtherance of substantial justice: *Leuba v. Bally*, 88 N.W.2d 73, 82-83 (Minn. 1958). A new trial should be granted only for errors or irregularities that materially affect the substantial rights of the moving the party. *Johnson v. Sleizer*, 129 N.W.2d 761, 764 (Minn. 1964). And, even if there are significant errors, a new trial should not be granted where it is apparent that the outcome

would not change. *Gopher State Bus. Opportunities, Inc. v. Stockman,* 121 N.W.2d 613, 615 (Minn. 1963).

Plaintiff's two arguments for new trial are as follows: (1) The Court erred in ruling, as inadmissible, the testimony of Eugene Rogers and Mark Kleckner as to Plaintiff's damages in regards to the additional 37.5 acres Plaintiff purchased; and (2) the Court erred in ruling, as inadmissible, the testimony of Eugene Rogers as to statements made by agents/employees of the City who were defendants in the underlying action.

A. Testimony of Eugene Rogers and Mark Kleckner as to Mr. Rogers' 37.5 acres

Plaintiff claims that "[a] person injured by the tortious conduct of another is entitled to recover damages for all past, present, and prospective harm legally caused by the tort." *Prior Lake State Bank v. Groth,* 108 N.W.2d 619 (1961). Thus, he should have been able to seek damages as they relate to the 37.5 acres of "non-developable" property he purchased after he initiated his underlying claim.

Although Plaintiff's statement of the law may be correct, its application to the current situation is not. Basically, Plaintiff is asking this Court to allow him to pile on damages. Plaintiff purchased the 37.5 acres after the underlying claim was initiated. Any access issues at the time were fully known to Plaintiff. Plaintiff has a duty to mitigate damages, not increase them. *Couture v. Novory,* 211 N.W.2d 172, 174 (Minn. 1973). Thus, any reference to the 37.5 acres would have been irrelevant in the underlying case.[9]

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[9] Plaintiff also claims that since the Court had ruled pretrial that Plaintiff could introduce evidence concerning the 37.5

Plaintiff's other argument in this respect is that Defendants advised him to purchase the property. According to Plaintiff, this advice somehow constituted negligence.

Defendants advised Plaintiff to purchase the 37.5 acres to ensure access to his property. Plaintiff's own experts acknowledged that this was sound advice and that the purchase did in fact ensure access.

B. Testimony of Eugene Rogers as to admissions made by agents/employees of the City

Plaintiff claims that the Court erred by not allowing him to testify to statements made by agents/employees of the City of Coon Rapids. Plaintiff claims that these statements qualify as admissions by a party opponent in the underlying case and thus, contrary to the Court's ruling, are not hearsay.

First, it should be noted that Plaintiff never made an offer or proof concerning these statements. Thus, on this ground, Plaintiff's motion is denied. *See* Minn. R. Evid. 103(a)(2) (2006).

Beyond this, there is some authority that supports the proposition that party-opponent statements in an underlying action are admissible in

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acres, such ruling became the "law of the case" and could not be reversed. But, when the Court made its initial ruling, neither the evidence nor Plaintiff's theory had fully presented itself. It was only after Plaintiff presented some of the evidence that the Court realized the irrelevancy and irrationality of the claim. It defies common sense and good judgment to allow an irrational position to stand, much less continue, under the situation. In fact, Plaintiff's own case law supports this. *See Honoaker v. Mahon*, 552 S.E.2d 788 (W.Va. 2001) ("[T]he ruling become the law of the case *unless modified* by a subsequent ruling of the court") (emphasis added).

an attorney-malpractice case. *See Mattson v. Schultz,* 145 F.3d 937, 940 (7th Cir. 1998) (discussing cases and secondary authority on this issue). Even assuming such statements qualified as non-hearsay in the underlying action, they would not have been relevant here. *See* Minn. R. Evid. 402 (2006) (stating that evidence must be relevant before it is admissible). Furthermore, it would not have changed the outcome of the case.

First, the only issue in the underlying inverse condemnation action was whether the City took Plaintiff's property without using its eminent domain powers. *See Nolan and Nolan v. City of Eagan,* 673 N.W.2d 487, 492 (Minn. Ct. App. 2003) (setting forth the requirement for such a claim). Statements by City officials would not tend to prove or disprove such a claim. The issue is relatively simple: did the City take Plaintiff's property without compensation.

Second, it is difficult to imagine how statements of the former city agents would have proved the "but for" causation issue, which was the basis of the Court's decision to grant Defendants judgment as a matter of law. In other words, it is difficult to believe that these statements would have supported the assertion that Plaintiff would have received more money in his underlying claim than that for which he settled: In fact, no one claimed that these officials were experts on Plaintiff's damage issue.

II.

In any district court action, the prevailing party shall be allowed reasonable costs and disbursements paid or incurred. Minn. Stat. § 549.04 (2006); *Johnson v. Ames Construction, Inc.,* 409 N.W.2d 560, 563 (Minn. Ct. App. 1987). Such costs

and disbursements include: depositions and copies thereof, even if such depositions were not used at trial and as long as the depositions are not cumulative, *Quade & Sons Refrigeration, Inc. v. Minnesota Min. & Mfg. Co.*, 510 N.W.2d 256, 258 (Minn. Ct App. 1994) (finding that the non use of a deposition at trial does not bar recovery of costs associated therewith); *Romain v. Pebble Creek Partners*, 310 N.W.2d 118, 124 (Minn. Ct. App. 1981) ("Deposition costs may include the costs of taking the originals and the costs of copies of depositions taken by either the prevailing party or losing party."); exhibits, Minn. Stat. § 357.315 (stating that "the reasonable cost of exhibits shall be allowed in the taxation of costs"); photocopying, *Stinson v. Clark Equipment Co.*, 473 N.W.2d 333, 338 (Minn. Ct. App. 1991); long distance phone calls, *id.;* FAX charges, *id.;* and parking and courier services, *id.*

In addition, the prevailing party may, within the court's discretion, recover reasonable fees associated with expert witnesses. Minn. Stat. § 357.25 (2006). Expert witness fees are not limited to the time a witness spends in the courtroom and can include pretrial preparation. *In re Boss*, 487 N.W.2d 256, 260 (Minn. Ct. App: 1992); *Lake Superior Center Authority v. Hammel, Green & Abrahamson*, 715 N.W.2d 458, 450 (Minn. Ct. App. 2006). Furthermore, in awarding such fees, the court is not limited to the $300 per day expert witness fee that the Court administrator can tax. *Lake Superior Center Authority*, 715 N.W.2d at 450; *Quade & Sons Refrigeration, Inc. v. Minnesota Min. & Mfg. Co.*, 510 N.W.2d 256, 258 (Minn. Ct App. 1994). Finally, even if the expert witness does not testify, the court may award such fees as long as defendant was prepared to

call the expert witness and the expenses related thereto were necessary to defend against the action. *Sherman v. Rasmussen,* 2001 WL 1117709, * 4 (Minn. Ct. App. 2001).

Here, Defendants' claimed costs and disbursements relate to filing fees, expert witness fees, photocopying, depositions, exhibits, phone calls, rental of a document camera, mediation fees, process-service fees, and traveling expenses. Defendants support the majority of these claims with appropriate invoices and supporting affidavits. In line with the authority cited above, these costs are recoverable and the Court finds that these expenses were necessary and reasonable to defending against Plaintiffs claims, except for the following: mediation fees, traveling expenses, and one of the process-service fees. The reasons for rejecting an award of these fees are as follows.

A. Mediation

Due to the fact that mediation and case settlement is highly encouraged by the legal system, *see Cincinnati Ins. Co. v. Franck,* 644 N.W.2d 471, 475 (Minn. Ct. App. 2002) ("[S]ettlements not only benefit the parties involved, but the justice system as a whole."), it would be unreasonable to require a losing party to pay the prevailing party's mediation expenses. In essence, there is no incentive for parties to mediate if one of them may ultimately be responsible for paying the other's mediation expenses. This acts as a deterrent to mediation and undermines the public policy reasons behind it.

Here, both parties were billed evenly for the mediation expenses they incurred. This is the appropriate method for allocating such expenses if

mediation is to be encouraged. The Court will not disturb that allocation.

B. Traveling Expenses

Defendants claim $591.61 for expenses related to traveling from and to motion hearings, conferences, and trial. Although these expenses may be reasonable and necessary, Defendants provide no authority for the awarding of such expenses.

C. Process Service Fee for Al Hofstedt

Defendants claim $38.69 for a process-service fee related to Al Hofstedt. Although this fee is recoverable, Defendants failed to provide an invoice related thereto. Furthermore, it is unknown whether this individual was necessary to defend against Plaintiff's claims.

Plaintiff, on the other hand, claims that Defendants' expert witness fees are not recoverable due to the fact that they never testified at trial. In support thereof, Plaintiff focuses on the highlighted wording of Minn. Stat. § 357.25, which provides:

> The judge of any court of record, before whom any witness is summoned or sworn and ***examined as an expert*** in any profession or calling, may allow such fees or compensation as may be just and reasonable. (emphasis added).

Contrary to Plaintiff's assertion, a number of cases recognize that a party may recover expert witness fees even if the expert is never called or examined as a witness. *Sherman v. Rasmussen,* 2001 WL 1117709, * 4 (Minn. Ct. App. 2001) (allowing expert witness fees for witnesses who did not testify at trial) (attached); *In re Boss,* 487 N.W.2d 256, 260 (Minn.

Ct. App. 1992) (finding that pretrial witness fees are recoverable); *Lake Superior Center Authority v. Hammel, Green & Abrahamson,* 715 N.W.2d 458, 450 (Minn: Ct. App. 2006) (same). Here, although Defendants' expert witnesses never testified, Defendants were prepared to call these witnesses if the Court did not grant their motion for a directed verdict. Furthermore, expenses incurred for these witnesses were necessary to defend against Plaintiff's malpractice claim.

In the alternative, Defendant claims that these expert witness fees are unreasonable. Awarding such fees, however, is in the sound discretion of the Court. *Dahlbeck v. DICO Co., Inc.,* 355 N.W.2d 157, 166 (Minn. Ct. App. 1984). In so doing, the court should take a hard look at the costs claimed, the needs of the case, and its importance and the strategies involved. *Romain v. Pebble Creek Partners,* 310 N.W.2d 118, 124 (Minn. 1981).

Since this malpractice case is a "case within a case," the files are extensive. Due to the voluminous nature of the files and the nature of the case itself, it is reasonable to conclude that it took Defendants' experts a considerable amount of time to review and analyze the many documents: Furthermore, as stated, each expert was necessary to defend against the elements of the case.

For instance, John McDonald, a senior shareholder with Meagher Geer law firm, was Defendants' expert on the applicable standard of care. According to Defendants, he spent time reviewing the underlying file, preparing his expert report, assisting in the formulation of cross-examination, and prepared to testify. Although Mr. McDonald charged Defendants $19,159:43 for his services, all of his

hours are documented and such hours appear to be reasonable under the circumstances. Furthermore, it appears that Mr. McDonald was Defendants' main witness and was instrumental and necessary to Defendants' defense.

Clay Dodd (real estate appraiser) and Terry Hermann (civil engineer), also witnesses on Defendants' behalf, were necessary to defending against Plaintiffs claimed damages and refuting Plaintiff's expert, Mark Kleckner. Furthermore, both witnesses' fees of $8,052.50 and $6,405.82, respectively, are reasonable under the circumstances.

Defendants also retained George Hoff as an expert witness: Mr. Hoff is someone who specialized in municipality law, including claims of inverse condemnation and 42 U.S.C. § 1983 takings. Since Plaintiff's underlying case concerned this same subject matter, Mr. Hoff was necessary to refute any claim on Plaintiffs behalf that Plaintiff would have won his underlying case but for Defendants' actions. Furthermore, Mr. Hoff's fees of $2,932.50 are reasonable under the circumstances.

Finally, Defendants hired Frank Svoboda as an expert witness. According to Defendants, Mr. Svoboda provided assistance as it related to the issue of wetlands surrounding Plaintiff's property and damages therein. Since Plaintiff raised issue regarding these wetlands, Mr. Svoboda's assistance was necessary to refuting any claims relating thereto. Mr. Svoboda's fees of $2,952.18 are reasonable under the circumstances.

Finally, Plaintiff claims that Minn. Stat. § 357.315, regarding the recovery-of exhibit fees, does not allow Defendants to recover the costs of enlarging exhibits. For this same reason, Plaintiff claims that

Defendants should not be able to recover the cost of renting a document camera.

Plaintiff used some of Defendants enlarged trial exhibits for its case-in-chief. Furthermore, due to the graphic detail of a number of these exhibits, enlargement seemed necessary under the circumstances.

In regard to the document camera, Plaintiff used one to display exhibits during his case-in-chief. Thus, it seemed reasonable for Defendants to do the same. Defendants paid rental fees for the camera in anticipation of presenting its case. And, those fees appear reasonable.

In sum, and based on the foregoing, Defendants are awarded $49,226.53 for the fees they incurred in defending against Plaintiff's claims: These fees include: Statutory costs ($200); filing fees ($975); deposition transcripts ($2,768.82); process service fee (Douglas Vierzba: $89.00); expert witness fees ($39,502.43); exhibit fees ($2,486.18); and other disbursements (copy of underlying file: $682.40; photocopies: $2,472.60; telephone charges: $50.10). For reasons noted above, Defendants shall not be awarded costs incurred in mediation ($1,325); one of the legal process service fees (Al Hofstedt: $38.69); and traveling expenses ($591.61).

ORDER

1. Plaintiff's motion for new trial is DENIED.

2. Defendants' motion for taxation of costs and disbursements is GRANTED in the amount of $49,226,53 and made as part of the Judgment.

Dated: 3 April 2007 BY THE COURT

s/_____
Robert B. Varco
Judge of District Court